

146.

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

-----In the Matter of-----)
)
PUBLIC UTILITIES COMMISSION) DOCKET NO. 03-0372
)
Instituting a Proceeding to)
Investigate Competitive Bidding)
for New Generating Capacity in)
Hawaii.)
_____)

DECISION AND ORDER NO. 22588

Filed June 30, 2006
At 11:30 o'clock A.M.

Karen Higash
Chief Clerk of the Commission

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Attachment: Framework for Competitive Bidding

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By this Decision and Order, the commission issues the attached proposed framework to govern competitive bidding as a mechanism for acquiring or building new generation in the State of Hawaii ("Framework").¹ The parties² shall submit comments to the commission on the proposed Framework, no later than July 31, 2006. Any comments submitted shall also address the issues set forth in Section III.D of this Decision and Order.

²The current parties are HAWAIIAN ELECTRIC COMPANY, INC. ("HECO"), HAWAII ELECTRIC LIGHT COMPANY, INC. ("HELCO"), MAUI ELECTRIC COMPANY, LIMITED ("MECO") (collectively, the "HECO Utilities"), KAUAI ISLAND UTILITY COOPERATIVE ("KIUC"), HAWAII RENEWABLE ENERGY ALLIANCE ("HREA"), and the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate") (collectively, the "Parties").

I.

Procedural History

On October 21, 2003, the commission instituted a proceeding to evaluate competitive bidding as a mechanism for acquiring or building new generation capacity in the State of Hawaii ("Hawaii" or "State").³ As noted by the commission at the outset of its investigation:

. . . . The competitive bidding process has been widely implemented throughout the United States and may serve as an alternative for Hawaii to facilitate wholesale market competition and enhance the potential for higher efficiency and lower costs for its electric industry.

Competitive bidding for new generating capacity is often referred to as a wholesale market model that includes equity and efficiency considerations, encouragement of competitive efficiency options and new technologies, lower costs through competition, more choices, reliable supplies, and a level playing field on which all generation options could compete. At this juncture, the commission believes that competitive bidding for new generating capacity may provide a viable, wholesale market competition alternative for the State of Hawaii.

Potential benefits traditionally identified with the competitive bidding process include, without limitation: (1) increasing the level of wholesale competition for electric power resources; (2) placing bidders under the same guidelines, rules, requirements, and bidding window, thereby allowing the best electric generation project to be selected; (3) encouraging new technologies and creative proposals; and (4) potentially lowering electricity prices and offering more choices to the electric consumer.

Order No. 20583, at 1 - 2.

³Order No. 20583, filed on October 21, 2003. Hawaii Revised Statutes ("HRS") §§ 269-7 and 269-15 and Hawaii Administrative Rules ("HAR") § 6-61-71 authorize the commission to examine and institute proceedings on any matter relating to a utility's practices and services or otherwise affecting the relations and transactions between the utility and public.

Through this investigative proceeding, the commission's intent was to explore competitive bidding issues that affect the electric industry in Hawaii. These issues include, but are not limited to:

- (1) evaluating the benefits and impacts of competitive bidding;
- (2) developing a fair competitive bidding system, if necessary, that:
 - (a) ensures that competitive benefits result from the system and ratepayers are not placed at undue risk;
 - (b) clearly specifies competitive bidding guidelines and requirements for prospective bidders, including the evaluation system to be used, and the process for evaluation and selection;
 - (c) encourages broad participation from a range of prospective bidders; and
- (3) developing the necessary revisions to the integrated resource planning process, if necessary.

Order No. 20583, at 2.

The commission named as parties to this proceeding the HECO Utilities, KIUC, and the Consumer Advocate. The commission also invited interested persons or entities to file motions to intervene or participate in this proceeding, within twenty (20) days of the filing of Order No. 20583, pursuant to HAR chapter 6-61.

Motions to intervene were timely filed by HREA, JOHNSON CONTROLS and PACIFIC MACHINERY, INC. (collectively, the "Hawaii Energy Services Companies"), the COUNTY OF MAUI ("COM"),

HESS MICROGEN, LLC, and THE GAS COMPANY, LLC ("TGC").⁴ Motions to participate without intervention were timely filed by the DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT, AND TOURISM ("DBEDT") and the COUNTY OF KAUAI ("COK"). On March 3, 2004, the commission: (1) granted the motions to intervene by HREA, the Hawaii Energy Services Companies, COM, Hess Microgen, LLC, and TGC; and (2) granted the motions to participate without intervention by DBEDT and the COK. Thereafter, during the course of the docket, some of the parties and participants withdrew or were dismissed as parties and participants to this proceeding, as noted below.⁵

On April 23, 2004, the commission issued Prehearing Order No. 20923, approving in part and modifying in part, the proposed stipulated prehearing order submitted on April 2, 2004, by the parties and participants.⁶ On September 28, 2004, a competitive bidding workshop was held by the HECO Utilities,

⁴Specifically, motions to intervene were filed: (1) on November 6, 2003, by HREA; (2) on November 7, 2003, by the Hawaii Energy Services Companies; and (3) on November 10, 2003, by the COM, Hess Microgen, LLC, and TGC.

⁵Order No. 20834, filed on March 3, 2004. The commission subsequently approved the requests for withdrawal of: (1) Pacific Machinery, Inc. and DBEDT, by Order No. 21357, filed on September 22, 2004; (2) TGC, by Order No. 21880, filed on June 20, 2005; (3) COM, by Order No. 21908, filed on July 8, 2005; (4) Hess Microgen, LLC, by Order No. 22090, filed on November 2, 2005; and (5) COK, by Order No. 22167, filed on December 7, 2005. The commission, by Order No. 22090, also dismissed Johnson Controls, Inc. as a party to this proceeding.

⁶Prehearing Order No. 20923 was subsequently amended by Order No. 21037, filed on June 9, 2004; Order No. 21575, filed on January 28, 2005; Order No. 22090, filed on November 2, 2005; and Order No. 22153, filed on December 1, 2005. See also Order No. 22249, filed on January 27, 2006; Order No. 22366, filed on March 31, 2006; and Order No. 22452, filed on May 3, 2006.

KIUC, the Consumer Advocate, TGC, Johnson Controls, HREA, Hess Microgen, LLC, COM, and COK.⁷ Preliminary Statements of Position were subsequently filed by: (1) COK on March 8, 2005; (2) the HECO Utilities, KIUC, the Consumer Advocate, Hess Microgen, LLC, and HREA, on March 14, 2005; and (3) COM on March 15, 2005. The remaining parties and participant then issued and responded to a number of information requests, including information requests issued by the commission on May 13, 2005.

Thereafter, final statements of position were filed by: (1) COK on August 10, 2005; (2) Hess Microgen, LLC, the Consumer Advocate, the HECO Utilities, and KIUC, on August 11, 2005; and (3) HREA on August 12, 2005. Some of the remaining parties then issued and responded to information requests arising from the information presented in the final statements of position.

On November 29, 2005, the commission held a prehearing conference with the then remaining parties and participant -- the HECO Utilities, KIUC, HREA, the Consumer Advocate, and COK⁸ -- in preparation for the panel hearing scheduled to commence on December 12, 2005.⁹ On December 1, 2005, the commission issued Order No. 22153, setting forth the various procedures and deadline dates identified at the prehearing conference to govern the panel hearing.

⁷See HECO's letter, dated October 8, 2004.

⁸See Notice of Prehearing Conference, dated November 17, 2005; and Order No. 22153, filed on December 1, 2005.

⁹See Notice of Evidentiary Hearing, dated November 29, 2005.

Pursuant to Order No. 22153: (1) the remaining Parties¹⁰ identified their respective witnesses for each panel and agreed on an order of cross examination.¹¹ In addition, the commission, on December 2, 2005,¹² issued the Outline of Topics for the Panel Hearing, and on December 7, 2005, issued the Agenda for the Panel Hearing.¹³

On December 12 - 16, 2005, the commission held a panel hearing to discuss the issues related to competitive bidding in the local electric utility industry, as set forth in the commission's Outline of Topics for the Panel Hearing, dated December 2, 2005.¹⁴ The Parties participated in a total of fourteen (14) panel sessions (A through N), in which the commission held open discussions with the Parties' panelists, with each party given the opportunity to question the other panelists for the purpose of developing a sound docket record.

As a result of the Consumer Advocate's efforts at the hearing held on December 16, 2005, the Parties proposed to file with the commission: (1) a joint submission outlining their areas

¹⁰Presently, the remaining parties are the HECO Utilities, KIUC, the Consumer Advocate, and HREA (collectively, the "Parties"). There are no remaining participants.

¹¹See Parties' joint letter, dated December 6, 2005; HECO Utilities' letter, dated December 6, 2005; KIUC's letter, dated December 6, 2005; Consumer Advocate's letter, dated December 6, 2005; and HREA's letter, dated December 6, 2005.

¹²Commission's letter, dated December 2, 2005, with enclosure.

¹³Commission's letter, dated December 7, 2005, with enclosures.

¹⁴See Transcript of Proceedings, held on December 12 - 16, 2005.

of agreement and disagreement; and (2) their post-hearing briefs discussing the Parties' respective positions on their areas of disagreement. The Parties also agreed to defer oral arguments to a later date, following the filing of the Parties' post-hearing briefs.¹⁵

To assist the Parties' efforts in this regard, the commission, on December 30, 2005, distributed to the Parties an Outline of Post-Hearing Questions "the Parties should address in their [forthcoming Joint Submission] and Post-Hearing Briefs[,] with a request that the "Parties address each question in their Post-Hearing Briefs, even if the issue is ultimately settled by the Parties."¹⁶

On May 22, 2006: (1) the HECO Utilities, KIUC, and the Consumer Advocate (collectively, the "Stipulating Parties") jointly filed their Stipulation Regarding Proposed Competitive Bidding Framework ("Stipulated Framework");¹⁷ and (2) HREA filed

¹⁵On December 16, 2005, HREA presented oral argument, with the Parties agreeing to allow HREA to participate in oral arguments again at a later date following the filing of the Parties' post-hearing briefs.

¹⁶Commission's letter, dated December 30, 2005, at 1. "At the December 16, 2005 hearing, the Outline of Post-Hearing Questions was referred to as a 'Table of Contents.'" Id. at 1 n.1.

¹⁷Stipulation Regarding Proposed Competitive Bidding Framework, Exhibit A, and Certificate of Service, filed on May 22, 2006. The Stipulated Framework consists of Parts I through VI, as follows:

- I. Context for Competitive Bidding
 - A. Use of Competitive Bidding
 - B. Scope of Competitive Bidding
 - C. Relationship to Integrated Resource Planning
 - D. Relationship to PURPA
 - E. Risk Mitigation/Contingency Planning

its Proposed Competitive Bidding Framework for Wholesale Generation (Plan B) ("HREA's Framework").¹⁸ Thereafter, the

-
- II. Roles in Competitive Bidding
 - A. Electric Utility
 - B. Hawaii Public Utilities Commission
 - C. Independent Observer
 - III. The Request for Proposals Process
 - A. General
 - B. Design of the Competitive Bidding Solicitation Process
 - C. Forms of Contracts
 - D. Issuance of the RFP and Development of Proposals
 - E. Bid Evaluation/Selection Criteria
 - F. Evaluation of the Bids
 - G. Contract Negotiations
 - H. Fairness Provisions and Transparency
 - IV. Dispute Resolution Process
 - V. Participation by the Host Utility
 - VI. Ratemaking

¹⁸Proposed Competitive Bidding Framework for Wholesale Generation (Plan B) of HREA; HREA's Proposed Plan B; and Certificate of Service.

As identified by HREA, key differences between the Stipulated Framework and HREA's Framework exist. Specifically, HREA's Framework: (1) applies to new wholesale generation that may include firm capacity and as-available power; (2) is limited to supply-side resources; (3) does not allow for direct competition (i.e., the self-build option) by the host electric utility in the request for proposal ("RFP") process; (4) allows for the option of using competitive bidding earlier in the IRP (see note 23, below) process to select projects for the electric utility's five (5)-year Action Plan; and (5) defines Parallel Plan as the electric utility's plan whereby a backstop proposal is prepared for comparison with non-utility bids, and in the event the RFP process fails, the utility can then request the commission to approve the utility's backstop proposal.

In addition, under HREA's Framework: (1) the Contingency Plan incorporates the Parallel Plan as a means of addressing the failure of an RFP or third-party, and then takes the process a step further to provide options in case the electric utility's backstop proposal also fails; (2) competitive bidding is not intended to supersede PURPA (see note 21, below); (3) the host utility would be precluded from submitting self-build project proposals or proposed turnkey projects, but instead, would prepare backstop proposals to invoke in the case that an RFP, selected third-party, or affiliate fails; (4) an independent observer would be required in all solicitations; and (5) an analysis would be performed before the electric utility releases

Parties filed their opening briefs on June 6, 2006, and their reply briefs on June 13, 2006.

Oral argument was held on June 19, 2006, 9:00 a.m., before the commission.¹⁹ During oral argument, the Parties responded to written questions previously issued by the commission to the Parties.²⁰

II.

Competitive Bidding

Because of its geographic isolation, and its historical dependence on a retail monopoly market structure, electricity in Hawaii has been produced by a limited number of players: the traditional electric utilities, plus "qualifying facilities" selling to the electric utilities under the mandate of the Public

the RFP, and if the potential balance sheet impacts were identified, this would be reported to the commission, and a description of the potential cost impacts would be included in the RFP.

¹⁹Appearing on behalf of the Parties were: Thomas W. Williams, Jr., Esq., and Peter Y. Kikuta, Esq., representing the HECO Utilities; Timothy Blume and Kent D. Morihara, Esq., representing KIUC; Jon S. Itomura, Esq., and Cheryl S. Kikuta, representing the Consumer Advocate, and Warren S. Bollmeier II, representing HREA.

²⁰See PUC Oral Argument Exhibits 1 and 3. See also PUC Oral Argument Exhibit 2. At oral argument, the HECO Utilities stated their intent to respond to the commission's Question No. 9 following the issuance of a stipulated protective order in this proceeding. On June 22, 2006, the Consumer Advocate submitted its written response to a question posed by the commission at Oral Argument. On June 26, 2006, the commission issued Stipulated Protective Order No. 22562, and on June 27, 2006, the HECO Utilities filed under confidential seal their list of offers to sell energy on an as-available basis by non-fossil fuel generation producers, in response to the commission's Question No. 9.

Utility Regulatory Policies Act of 1978, as amended ("PURPA").²¹ The commission, by its Decision and Order and Framework, intends to facilitate the increase in the number and type of wholesale suppliers, allowing them to compete among themselves and with the local electric utility.

Competitive bidding can benefit consumers by inducing all players to reduce their costs and increase innovation. Moreover, diversity of supply can increase reliability by reducing dependence on a limited number of suppliers.

As set forth in Part II.A.3.a of the Framework:

Competitive bidding will benefit Hawaii when it: (i) facilitates an electric utility's acquisition of supply-side resources in a cost-effective and systematic manner; (ii) offers a means by which to acquire new generating resources that are overall lower in cost or better performing than the utility could otherwise achieve; (iii) does not negatively impact the reliability or unduly encumber the operation or maintenance of Hawaii's unique island electric systems; (iv) promotes electric utility system reliability by facilitating the timely acquisition of needed generation resources and allowing the utility to adjust to changes in circumstances; and (v) is consistent with IRP objectives.

Framework, Part II.A.3.a.

Concomitantly, competitive procurement also brings risks. Most independent power producers ("IPPs") lack the knowledge and experience the incumbent utility has gained by serving Hawaii's unique system for over a century. Also, the IPPs' financial strength depends on willing lenders and

²¹See generally 16 U.S.C. §§ 824 - 824w.

shareholders that can withhold their investments when risks get too high. The utility's financing, in contrast, is more secure, backed by the predictable monthly payments from thousands of captive customers whose inelastic demand for electricity does not vary greatly with market risks.

Systematically and prudently administered, competitive procurement can address both points. The chance to compete on the merits will attract IPPs if they see a process free of bias. Threshold requirements and evaluative criteria, conservatively applied, can limit the risk to ratepayers. What should result is competition on the merits, a process which seeks better electricity solutions while maintaining overall system reliability. That is the underlying principle of the commission's Framework.

The Parties, through their participation in the panel hearing and oral argument, statements of position, post-hearing briefs, and their proposed frameworks, contributed many insightful concepts and ideas. The commission, through its Framework, adopted as much of the Parties' language as it could, while remaining consistent with the following six (6) principles:

1. The electric utility shall use competitive bidding whenever such process will advance the overall goal of providing safe and reliable electric service at reasonable rates.
2. The design and implementation process of competitive bidding must produce, as winners, the most meritorious projects.
3. All electric utility actions shall be consistent with prudent electric utility practice and best electric utility practices.

4. The competitive bidding process must be designed so that throughout each step, the interests of all participants are aligned with the public interest, consistent with State law.
5. Whenever (A) there is a potential conflict between the electric utility's financial interest and the public interest, and (B) such conflict is unavoidable due to the electric utility's dual roles as designer of and participant in a competitive bidding process, then (C) procedures and reviews must be in place to prevent such conflict from biasing the outcome of the process. Thus, the electric utility cannot have a pecuniary stake in a particular competition, while also designing and judging the competition, without close oversight by an independent observer.
6. Because drafting a Framework in the abstract differs from applying it in practice, there is a process for seeking waivers from any and all parts of the Framework.

Finally, while the Framework creates in the utility a competitive bidding obligation, the Framework leans conservatively, allowing for a great amount of flexibility and the consideration of requests for waiver where appropriate. This is because, as unique island systems that are not interconnected with other grids as they are on the mainland, the margin for error in Hawaii is smaller. Each island's system must stand on its own as efficient and reliable systems. The application and effects of the Framework will be known only as implementation occurs, so it must be designed with a fair amount of flexibility to address any unforeseen and unintended consequences.

The remainder of this Decision and Order discusses the commission's major modifications to the respective frameworks

proposed by the Parties, under each of the six (6) major Parts of the Framework:²²

- Context for Competitive Bidding
- Roles in Competitive Bidding
- The Request for Proposals Process
- Dispute Resolution Process
- Participation by the Host Utility
- Ratemaking

See Framework, Table of Contents.

III.

Context for Competitive Bidding

A.

Use of Competitive Bidding

1.

The Competitive Bidding Requirement

Part II.A of the Framework establishes a utility's general obligation to use competitive bidding to establish a future generation resource or a block of generation resources, subject to requests for waiver. Thus, the final decision on whether to use competitive bidding for a particular project rests with the commission.

The commission will make that decision during its review of the utility's Integrated Resource Plan ("IRP").²³ The

²²The commission has incorporated a new Part into the Framework that governs definitions. See Framework, Part I, Definitions.

²³In general, the term "IRP" means an electric utility's Integrated Resource Plan that has been submitted to the commission for review and approval in the utility's IRP proceeding, in accordance with the commission's Framework for Integrated Resource Planning, dated May 9, 1992, as amended ("IRP

utility's submitted IRP must specify: (A) the projects proposed for competitive bidding; and (B) the projects for which the utility requests a waiver from the Framework, if any.

The decision on whether to use competitive bidding requires a weighing of benefits and costs, and opportunities and risks. There is tension among multiple goals; among them, attracting new entrants over the long-term, ensuring reliable electricity in the short-term, and bearing extra costs in the short-term to increase diversity and reduce costs in the long-term. While the utility's unique expertise has much to contribute, the final balance must be struck by a neutral entity, the commission.

Framework"). The overall goal of integrated resource planning is the identification of the resources or mix of resources for meeting near and long-term customer energy needs in an efficient and reliable manner at the lowest reasonable cost. Each electric utility is responsible for developing an IRP that meets the energy needs of its customers. The IRP Framework requires each electric utility to develop a long-range, twenty (20)-year plan and a medium-range five (5)-year action plan to be submitted on a three (3)-year planning cycle for the commission's review and approval. The IRP process is a vehicle for the commission, the electric utilities, energy stakeholders, and the public to understand and influence the planning process involved in identifying and evaluating the mix of demand-side and supply-side energy resources needed to meet near and long-term energy needs in an efficient and reliable manner at the lowest reasonable cost.

An approved IRP means an electric utility's IRP that has been approved by the commission in the utility's IRP proceeding. As of the effective date of this Decision and Order: (1) on October 28, 2005, HECO filed its 3rd IRP in In re Hawaiian Elec. Co., Inc., Docket No. 03-0253; (2) MECO is scheduled to file its 3rd IRP by October 31, 2006, in In re Maui Elec. Co., Ltd., Docket No. 04-0077; (3) HELCO is scheduled to file its 3rd IRP by December 29, 2006, in In re Hawaii Elec. Light Co., Inc., Docket No. 04-0046; and (4) on June 20, 2006, the commission opened a proceeding for KIUC's 3rd IRP in In re Kauai Island Util. Coop., Docket No. 2006-0165.

Some have argued that imposing a competitive bidding obligation on the utility is unnecessary, because the commission can hold the utility accountable in its next rate case. There, the commission could disallow costs incurred that were excessive due to the utility's failure to implement competitive bidding. This disallowance tool, by itself, is too uncertain to be effective. It would be difficult to trace particular utility costs to the absence of competitive bidding. The utility, moreover, might calculate that the prospect of profit from its rate-based plant is larger than the prospect of disallowance due to its avoidance of competitive bidding. This uncertainty will make Hawaii unattractive to bidders, therefore reducing the effectiveness of competitive bidding. Moreover, should the commission opt to use cost disallowance as a means of inducing prudent utility behavior, the cost disallowance tool is better informed if there are benchmarks supplied by real competition.

Part II.A.3 of the Framework states that the competitive bidding mandate shall apply to a future generation resource "whether or not such resource has been identified in a utility's IRP." While the commission expects most resources to emerge from the IRP process rather than outside that process, the competitive bidding obligation should apply either way. Otherwise, there could be an incentive to avoid competitive bidding by proposing resources outside of the IRP process.

The Role of Utility Discretion

The competitive bidding process must be fair and neutral and be perceived as such by independent bidders. The process will be fair and neutral only if the discretion granted to the electric utility is limited. The Stipulated Framework does not satisfy this standard. The term "should" appeared more than fifty (50) times; the term "may" more than eighty (80). These terms create discretion rather than obligation; they introduce subjectivity rather than objectivity.

The commission recognizes that the electric utility must have discretion to carry out its obligation to serve. In this regard, the Framework grants the utility ample discretion. But it draws the line between mandate and discretion differently than the Stipulated Framework.

In drawing that line, the commission followed this principle: where utility discretion could introduce bias, actual or perceived, in favor of an electric utility project, the commission sought to minimize utility discretion. Where the efficiency and reliability of Hawaii's electricity system was at stake, the commission sought to maximize utility discretion. The commission concluded that the Stipulated Framework did not distinguish these situations sufficiently. Thus, the Stipulated Framework displayed insufficient recognition such that when the utility has a pecuniary interest in the outcome, and where that pecuniary interest might deviate from the ratepayers' or bidders'

interests, the utility's decision-making discretion must be limited, and reviewed by a neutral entity.

The commission acknowledges the tension between limiting the electric utility's discretion and assuring sufficiency of resources. The Framework incorporates provisions that aim to resolve that tension, by allowing for waivers in many contexts, including emergency situations.

The commission also recognizes that in the case of a real emergency, or unanticipated and drastic change in circumstances, sufficient time for independent observer comments and commission review will not be readily available. In such situations, reliability will require utility discretion. The commission expects such instances to be rare. If the commission determines that the alleged insufficiency of time is a result of utility actions or omissions that are inconsistent with prudent utility practice, the commission will take such actions as are authorized by State law to hold the utility accountable and to prevent recurrence of the action or omission.

What is important is competition on the merits, with no favoritism arising from the utility's legal status, incumbency, or market share.

3.

Exemption for Organizations in Which There is No Substantial Conflict Between Owner Interest and Customer Interest

Part II.A.5 of the Framework authorizes exemption from the Framework for organizations that have an ownership structure

in which there is no substantial difference in economic interests between its owners and its customers, such that the electric utility has no disincentive to pursue new generation projects through competitive bidding. This language intends to draw a distinction between an investor-owned utility and a cooperatively-owned entity. In the former case, the utility's financial interest will tend to favor, all else being equal, a rate-base solution rather than a purchase solution. That tendency creates a potential conflict between shareholder interest and ratepayer interest.

In the latter case, where most of the owners are also the customers, this conflict is smaller or absent. While a cooperative-like entity, to the extent it is treated as a "public utility" under Hawaii law, might still be subject to commission regulation, such regulation need not include this Framework. Under the commission's rationale, there is no reason to assume that such an organization will make decisions that favor owners over customers. Nonetheless, the commission will reexamine the exemption granted, should such a conflict arise in the future.

4.

Exemption for Pending Projects and Offers to Sell

The commission adopts the Stipulating Parties' proposal to exempt from competitive bidding the three pending projects referenced in Part II.A.3.e of the Framework: HECO's Campbell Industrial Park CT-1, HELCO's Keahole ST-7, and MECO's Maalaea M-18. The commission has determined that these utility

efforts are sufficiently advanced, and the need for these resources sufficiently imminent, such that the injection of a competitive bidding process would interfere with utility activities necessary to ensuring sufficient resources at reasonable cost. Likewise, the commission, consistent with the public interest, exempts from the competitive bidding process "offers to sell energy on an as-available basis by non-fossil fuel producers that are under review by an electric utility at the time this Framework is adopted."²⁴

5.

Waiver

The commission will apply the competitive bidding mandate flexibly, granting waivers where bidding will be unproductive or will conflict with the utility's obligation to bring resources on-line timely and at reasonable cost. Part II.A.3 lists the criteria applicable to waivers. Most of these criteria were adopted from the Stipulated Framework.

Part II.A.4 establishes the procedure for requesting a waiver. A distinct procedure is necessary for each of the three scenarios, described as follows:

1. Proposed generation projects included in, or consistent with, IRPs approved by the commission prior to the effective date of this Framework;

²⁴Framework, Part II.A.3.e. The offers to sell energy that are exempt from the Framework are set forth in: (1) KIUC's Oral Argument Hearing Exhibit A, dated June 19, 2006; and (2) the HECO Utilities' list submitted to the commission under confidential protective order on June 27, 2006.

2. Proposed generation projects included in, or consistent with, the IRP filed for commission approval in HECO's pending IRP docket, In re Hawaiian Elec. Co., Inc., Docket No. 03-0253; and
3. Proposed generation projects included in, or consistent with, IRPs that have not yet been filed with the commission for approval as of the effective date of this Framework.

See Framework, Part II.A.4.a(i) - (iii).

Part II.A.4.a(iv) of the Framework emphasizes that a utility must seek waivers in a timely manner. The commission intends to avoid being forced to forego competitive bidding due to the imminence of a reliability problem. Absent extraordinary conditions, the commission expects to receive any waiver request "as soon as practicable such that, in the event the Commission denies the request, sufficient time remains to conduct competitive bidding without imprudently risking system reliability."

Part II.A.4.b provides that "[i]n no event shall a Commission decision granting a waiver be construed as determinative of whether an electric utility acted prudently in the matter." Where the utility's own delays made competitive bidding impractical, a waiver does not protect against a finding of imprudence. Since the question of a waiver will arise first in the IRP process (the submitted IRP must designate which resources will be subjected to competitive bidding and which will not), there will be ample time for all projects to vet waiver requests.

B.

Scope of Competitive Bidding

The commission accepts the Stipulated Framework, with minimal revisions.²⁵

C.

Relationship to Integrated Resource Planning

The commission accepts the Stipulated Framework's general approach to the integration of competitive bidding and integrated resource planning. The IRP process identifies needed resources. Thereafter, the IRP will identify those resources for which competitive bidding is appropriate, and those for which waivers are necessary.

The submission of the IRP to the commission must contain, for any waiver request, an explanation of the facts supporting a waiver, citing the criteria listed in the Framework. The commission then will rule on the IRP and the waiver requests, if any.

Part II.C.5 of the Framework provides that a utility's evaluation of competitive bids "may reveal desirable projects that were not included in an approved IRP." If so, "[t]hese projects may be selected if it can be demonstrated that the project is consistent with an approved IRP and that such action is expected to benefit the utility and its ratepayers."

²⁵Primarily, using "shall" instead of "should" throughout Part II.B of the Framework.

D.

Treatment of PURPA "Qualifying Facilities"

The Stipulated Framework proposes that a PURPA qualifying facility ("QF") will have no additional rights that a non-QF does not have, and therefore, the Framework "supersedes" PURPA.²⁶

The commission has no authority to "supersede" PURPA. Such action would be unlawful on its face.²⁷ This matter is a

²⁶At oral argument, the Stipulating Parties, in response to the commission's questions, clarified that the Stipulated Framework is not intended to preempt PURPA. Instead, in general, the Stipulated Framework is intended to work consistent with and in conjunction with PURPA. See Transcript of Oral Argument Proceeding, held on June 19, 2006, at 1200 - 1202, 1212, and 1216 - 1219 (HECO Utilities); 1227 - 1229 (KIUC); and 1239 - 1240 and 1244 - 1247 (Consumer Advocate).

²⁷While a state commission has no power to "supersede" PURPA, FERC does have the authority to grant waivers from some or all of its PURPA regulations. See Small Power Production and Cogeneration Facilities: Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, Order No. 69, FERC Stats. & Regs. Regulations Preambles 1977-1981 P30,128 at 30,871, 30,894 (1980), order on reh'g, Order No. 69-A, FERC Stats. & Regs. Regulations Preambles 1977-1981 P30,160 (1980), aff'd in part and vacated in part, Am. Elec. Power Serv. Corp. v. Federal Energy Regulatory Comm'n, 675 F.2d 1226 (D.C. Cir. 1982), rev'd in part, Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp., 461 U.S. 402 (1983). Nonetheless, FERC has rejected as grounds for a waiver the mere possibility of wholesale market opportunities. In Cogen Lyondell, Inc., 95 F.E.R.C. 61,243 (2001), the Public Utility Commission of Texas ("Texas Commission") argued that: (1) each of several Texas utilities were restructuring into separate generation, transmission, and distribution affiliates; (2) retail competition would provide a market for QF sales; and (3) Texas-wide independent system operator activities would create wholesale market activities. Based on these facts, the Texas Commission sought a waiver of the PURPA purchase obligation for the restructuring utilities.

FERC rejected the Texas Commission's request, describing it as "relying on broad competitive assertions." FERC explained that the Texas Commission's proposal amounted to an opportunity for QFs to make sales, which is inferior to having an electric

difficult one, requiring a reconciliation of two seemingly conflicting objectives: competition on the merits, and preference for one type of supplier, the PURPA QF.

PURPA remains the law, and it creates in QFs a right to sell power to the utility at avoided cost. The commission is without authority to "supersede" that right. While the Stipulating Parties, during Oral Argument, clarified that their Stipulated Framework is not intended to preempt PURPA, they offer no specifics on how to recognize and preserve a QF's PURPA rights in the context of competitive bidding, other than their statement that "PURPA qualifying facilities should be given a reasonable opportunity to participate in these solicitations, which would address the utility's capacity requirements."²⁸

Certain options discussed in other states include: (1) having a separate bidding process for QFs alone;²⁹ or (2) having a bidding process that includes QFs and non-QFs, but allows losing QFs the right of first refusal to match the winning non-QF offer.³⁰

utility-purchaser with a mandatory purchase obligation under PURPA. In the commission's view, the Stipulated Framework suffers from the same defect.

²⁸Stipulated Framework, Part I.D.

²⁹In response, FERC has ruled that a QF-only bidding process violates PURPA because it does not ensure a price equal to avoided cost. See Southern California Edison Co., 10 F.E.R.C. 61,215 (1995). When competitive bidding is used to set avoided cost, all sources must participate for the resulting price to satisfy the avoided cost standard.

³⁰On the surface, this approach preserves the QF's right to sell at avoided cost, with avoided cost determined as the price offered by the winning bid. The winning bid appears to be avoided cost because it is the cost the utility would incur if it

The commission, by this Decision and Order, will instruct the Parties to submit written briefs that address the following issues:³¹

did not buy from the QF. The problem that arises is that the QF's right of first refusal will distort the market, since non-QFs will have little interest in "competing" in a context where their likely role will be to set a price for someone else rather than being selected as the winning bidder. Since at least some non-QFs will likely sit out of the competition, the resulting winning price will not be a true measure of avoided cost. Instead, it will be higher than avoided cost.

³¹The Parties should also comment on the following possible framework for addressing these issues or propose possible alternatives or variations as appropriate:

1. For any resource to which the competitive bidding requirement does not apply (due to waiver or exemption), the utility retains its traditional obligation to purchase capacity and energy from a QF at avoided cost.
2. For any resource to which the competitive bidding requirement does apply, a QF must participate in the bidding process (which will include QFs and non-QFs) as a prerequisite to realizing its PURPA rights. The QF's treatment will then depend on whether the winner is a non-QF or a QF:
3. If a non-QF is the winning bidder:
 - A. A QF will have no PURPA right to supply the resource provided by a non-QF winning bidder.
 - B. If a non-QF winner did not supply all the capacity needed by the utility, or if a need develops between RFPs, a QF, upon submitting a viable offer, is permitted to exercise its PURPA rights to sell at avoided cost. The commission's determination of avoided cost will be bounded by the price level established by the winning non-QF.
4. Where there is no winning bidder because the utility's self-build option is the most attractive option, a QF is permitted to exercise its PURPA rights by making a viable offer to meet or beat the utility's self-build option.
5. If a QF is the winning bidder, the QF has the right to sell to the utility at its bid price.

1. Is the commission authorized under PURPA and any other applicable laws to require that a QF must participate and submit a bid in a competitive bidding process established by the commission in order to preserve certain PURPA rights of the QF?
2. If yes, and the QF prevails in the competitive bidding process, what is the utility's avoided cost?
3. If yes, and the QF does not prevail in the competitive bidding process, what is the QF's PURPA rights, if any, and in conjunction thereto, what is the utility's avoided cost?
4. If yes, and the winning bidder is the utility's self-build option, what is the QF's PURPA rights, if any, and in conjunction thereto, what is the utility's avoided cost?
5. Identify and describe what amendments to HAR chapter 6-74, Standards for Small Power Production and Cogeneration, are necessary to implement effective competitive bidding in the State. Include any amendatory language proposed by the party.

E.

Mitigation of Risks
Associated with Competitive Bidding

The commission, in this Decision and Order, has described the tension between competitive bidding and resource

sufficiency. To ensure consistency between these two goals, the utility must conduct, or consider conducting, three types of activities: self build, parallel planning, and contingency planning.³² The utility's self-build obligation is addressed in Section VII of this Decision and Order, below. The utility's parallel planning and contingency planning activities are discussed here.

The Framework accepts in part the Stipulated Framework's treatment of parallel planning and contingency planning, but adds a few concepts. The utility must always use prudent utility practices in determining whether to carry out these activities, how much cost to incur, and when to pause or terminate them. Part II.E.2 of the Framework provides that for each project that is subjected to competitive bidding, the electric utility shall submit a report on the cost of parallel planning upon the commission's request. These reports will

³²The term "Parallel Plan" means the generating unit plan (comprised of one or more multiple generation resources) that is pursued by the electric utility in parallel with a third-party project selected in an RFP until there is reasonable assurance that the third-party project will reach commercial operation, or until such action can no longer be justified to be reasonable. The utility's Parallel Plan unit(s) may be different from that proposed in the utility's bid. Framework, Part I.

The term "Contingency Plan" means an electric utility's plan to provide either temporary or permanent generation or load reduction programs to address a near-term need for capacity as a result of an actual or expected failure of an RFP process to produce a viable project proposal, or of a project selected in an RFP. The utility's Contingency Plan may be different from the utility's Parallel Plan and the utility's bid. Framework, Part I.

The term "utility's bid," as used in both definitions, refers to a utility's proposal advanced in response to a need that is addressed by its RFP. Framework, Part I.

inform the commission about the full costs of competitive bidding, so that the commission may weigh the costs and benefits of the procurement process.

IV.

Roles in Competitive Bidding

A.

Electric Utility

1.

Obligations and Responsibilities

With or without competitive bidding, the electric utility is obligated to ensure reliable service at reasonable cost. In the context of competitive bidding, that obligation requires a set of utility activities ranging from designing the solicitation process to selecting the winner, along with carrying out parallel planning and contingency activities where necessary. These activities are inherent in the obligation to serve; they cannot be delegated. To the list of activities set forth in the Stipulated Framework, the commission, at Part III.A.1 and III.A.4 of the Framework, has added several utility responsibilities, including:

1. Determining, where and when feasible, the interconnection facilities and transmission upgrades necessary to accommodate new generation (this subject is discussed in more detail in Section V.H of this Decision and Order, below);
2. Providing the Independent Observer with all requested information; and

3. Submitting a Code of Conduct to the commission for approval, with such submission and approval to occur prior to the commencement of any competitive bid process under this Framework.³³

See Framework, Part III.A.1(g) and (i); and Part III.A.4.

Because the Code of Conduct is generic, i.e., the Code is not unique to a particular competitive process or project, it will be most efficient for the parties to work on developing the Code, and for the utility to submit the Code to the commission for approval, well in advance of future generation need. Addressing the Code early and satisfactorily will help create confidence among prospective bidders that the competitive process in Hawaii will be based and judged on the merits.

2.

Site Access

A significant difference between the Parties' respective proposed frameworks is the treatment of utility sites. The utility's public service obligation requires it to acquire and maintain sufficient sites to allow for future needs. If available sites are in short supply, and if desirable sites have been purchased or leased by the utility already, bidders will have a competitive disadvantage, one not based on the project's

³³The term "Code of Conduct" refers to a written code developed by the host electric utility and approved by the commission to ensure the fairness and integrity of the competitive bidding process, in particular where the host utility or its affiliate seeks to advance its own resource proposal in response to an RFP. Framework, Part I. The "Code of Conduct" is more fully described in Part IV.H.9.c of the Framework.

merits. Absent equivalent access to scarce sites, independent companies may choose not to bid; or if they bid, will have bids that are more expensive or less certain due to the inferiority of their sites. These facts argue for requiring the utility to grant site access to independent bidders.

The HECO Utilities contend that the commission lacks authority to order a utility to grant site access. They contend that ordering access will constitute a "taking" under the Fifth Amendment of the United States Constitution ("Fifth Amendment").³⁴

In GTE Hawaiian Tel. Co. Inc. v. Public Util. Comm'n and TelHawaii, Inc. ("TelHawaii"), Civil No. 97-4371-10, Findings of Fact, Conclusions of Law and Order, filed on April 1, 1999, the First Circuit Court of Hawaii ("Court") held that: (1) the forced or compelled transfer of the incumbent telecommunications carrier's Ka'u-based assets (GTE Hawaiian Tel. Co. Inc.) to a commission-designated carrier of last resort (TelHawaii, Inc.) amounted to a condemnation of the incumbent telecommunications carrier's assets; (2) the commission was not vested with the power of eminent domain required to accomplish such a condemnation of the incumbent telecommunications carrier's Ka'u-based assets; thus (3) the commission acted beyond its powers by ordering the incumbent telecommunications carrier to

³⁴U.S. Const. art. V (private property shall not be taken for public use without just compensation); see also Haw. Const. art. I, § 20 (private property shall not be taken or damaged for public use without just compensation).

transfer its Ka'u-based assets to the PUC-designated carrier of last resort.³⁵ Id. at 13.

The Court also held that, even if the commission had been granted the power of eminent domain, the forced negotiation scheme imposed by the commission was contrary to the constitutional requirement that the incumbent telecommunications carrier was entitled to just compensation for the taking of its assets. Id.

Applied here, TelHawaii instructs that the commission has no legal authority to order an electric utility to share its sites with third-parties. This legal result produces an unsatisfactory situation. Site shortages, combined with the utility's obligation to acquire sites for future use, may give the utility's self-bid proposal a strategic advantage not based on the merits of the utility's proposal. This advantage, if competitively significant, will discourage bidders. Compounding the problem, for bidders who do bid, is that the utility will be evaluating the quality of its competitors' sites as compared to its own sites -- a task the utility cannot carry out objectively.

The Stipulated Framework proposes that the utility consider offering site access on a project-by-project basis, applying a set of criteria. The criteria listed are reasonable, but the subjectivity required to apply them will leave bidders with a perception of utility bias.

³⁵On April 29, 1999, TelHawaii appealed the Court's decision to the Hawaii Supreme Court ("HSC"). Thereafter, on July 16, 1999, TelHawaii filed a Motion to Dismiss its Appeal. On July 27, 1999, the HSC issued an Order: (1) granting TelHawaii's motion; and (2) dismissing TelHawaii's appeal.

Given these legal and practical constraints, the sole solution left for the commission (other than seeking statutory authority to order site access), has two parts: (1) remind the utility that it must place the commission's goal of competition on the merits ahead of the utility's financial goals; and (2) monitor the utility's compliance with this obligation. To achieve these two objectives, the Framework adds the following requirements or considerations to those listed in the Stipulated Framework:

1. Part III.A.3.d requires the utility to consider the "effect on competitive forces of denying bidders the ability to use the site, taking into account whether the unavailability of adequate sites for non-utility bidders gives the electric utility a competitive advantage."
2. Part III.A.3.e adds that "[w]here the utility has chosen not to offer a site to a third-party, the electric utility shall present its reasons, specific to the project and sites at issue, in writing to the Independent Observer and the Commission."

See Framework, Part III.A.3d and e.

B.

Hawaii Public Utilities Commission

The commission's underlying obligation is to ensure that the provision of electric service to Hawaii's customers is safe, reliable, and reasonably priced. Applied to competitive bidding, this obligation translates into ensuring that: (1) the utility uses a competitive bidding process whenever such process advances the goals of supplying safe and reliable electric

service at a reasonable rate; and (2) each such process produces the most meritorious result.

Consistent with these roles, the Framework largely accepts the Stipulated Framework, with several additions at Parts III.B.6 and III.B.7, as follows:

6. The Commission shall review and approve (and modify if necessary), the electric utility's tariffs for interconnection and transmission upgrades required by Part IV.I of this Framework; and
7. The Commission shall review any complaint that the electric utility is not complying with the Framework, pursuant to Part V.

Framework, Part III.B.6 and 7.

Moreover, the commission intends to carry out its Framework responsibilities efficiently, with minimal procedural formality. Thus, Part III.B.8 of the Framework provides:

Timely Commission review, approval, consent, or other action described in this Framework is essential to the efficient and effective execution of this competitive bidding process. Accordingly, to expedite Commission action in this competitive bidding process, whenever Commission review, approval, consent, or action is required under this Framework, the Commission may do so in an informal expedited process. The Commission hereby authorizes its Chairman, or his designee (which designee, may be another Commissioner, a member of the Commission staff, Commission hearings officer, or a Commission hired consultant), in consultation with other Commissioners, Commission staff, and the Independent Observer, to take any such action on behalf of the Commission.

Framework, Part III.B.8.

If all participants follow the Framework, the commission's prospective involvement should be limited. After approving an IRP, the commission intends to remain in the background, monitoring the competitive bidding process. The

commercial processes of RFPs, solicitations, bidding, evaluations and selections -- customary throughout the business world -- should not become matters for regulatory intervention unless compliance with this Framework is questioned. The commission does not intend to invite or entertain frequent protests or appeals; nor is the commission intending to create a government-protected right to any particular outcome by this Framework.

While the commission will review any complaint alleging a utility's non-compliance with the Framework pursuant to Part V of the Framework, complainants should take care to distinguish disappointment from a real claim. Concomitantly, the utility should recognize that its dual role as competitor and judge leaves it vulnerable to bias, intentional or inadvertent, and that behaviors causing bidders to question utility neutrality will damage the process.

C.

Independent Observer

The independent observer's purpose is to prevent utility favoritism towards utility self-build or utility affiliate proposals. Favoritism can begin with the preparation of the RFP, which might bias specifications to favor one project. Because bias may enter at other points (such as during the IRP process, which might choose particular resources so as to favor the utility or its affiliate), the Framework reserves the

commission's ability to require an independent observer at other points as well.

The independent observer must report any defects to the commission sufficiently early so that the commission can remove them in time for the competitive bidding process to produce timely results.

Under the Framework, the independent observer must also observe any "interaction" between the utility and its affiliate. The Framework uses the term "interaction" rather than the Stipulated Framework's term "negotiations." The commission finds the absence of any "negotiations" in the practical sense between a utility and its affiliate. "Negotiations" imply "arms-length" negotiations. But with both entities controlled by a common owner, their interaction will produce whatever is desired by their common owner. If the affiliate wins, the independent observer must determine whether the comparison was based on the merits.

The Framework divides the independent observer's obligations into two categories: advisory and monitoring. In the advisory role, the independent observer will certify to the commission that at each step, the electric utility's judgments created no unearned advantage for the utility or any affiliate. In the monitoring role, the independent observer will monitor and report to the commission on all steps in the competitive bidding process.

The independent observer will have no decision-making authority, and no obligation to resolve disputes, but may offer to mediate between disputing parties,

As to the independent observer's qualifications, the Framework accepts most of the Stipulated Framework's suggestions. One change is that a prospective independent observer who presently lacks detailed knowledge of the unique characteristics and needs of Hawaii's electric utilities should not be disqualified if the person can rapidly absorb such facts. Otherwise the pool of applicants will be too limited.

The Stipulated Framework provides that the utility will choose the independent observer. Conversely, the Framework makes several adjustments, to ensure neutrality.

Specifically, Part III.C.6 of the Framework provides that the utility will select the independent observer, but must select from a list approved by the commission. All participants in the competitive bidding process can contribute recommendations to the list. Also, the utility's contract with the independent observer must be acceptable to the commission, and provide that the independent observer "(a) report to the Commission and carry out such tasks as directed by the Commission, including the tasks described in this Framework; (b) cannot be terminated and payment cannot be withheld without the consent of the Commission; and (c) can be terminated by the Commission without the utility's consent, if the Commission deems it to be in the public interest in the furtherance of the objectives of this Framework to do so." Framework, Part III.C.6.

These adjustments, the commission believes, are necessary to protect the integrity of the independent observer's role. If there is any perception that the independent observer has loyalty to the utility that exceeds the observer's loyalty to the Framework, then bidder interest will decline. For administrative reasons, the commission prefers that the independent observer's contract be with the utility; but the commission intends that the independent observer's primary accountability and loyalty will be to the commission and this Framework.

The independent observer's prudently incurred costs will be recoverable from the utility's customers upon approval of the commission in a rate case or other appropriate proceeding.

V.

The Requests for Proposals Process

On this subject, the commission has made several modifications to the Stipulated Framework.

A.

Proposed Forms of Contracts

Accompanying each RFP will be proposed forms of PPAs and other contracts, with commercially reasonable terms and conditions that properly allocate risks among the contracting parties in light of circumstances. Some elements of these contracts will be negotiable with winning or short-listed

bidders; and these elements, plus perhaps others, could be "redlined" by bidders as part of their proposals.

The commission expects that some clauses will be negotiable and others not; and for some, the bidders may submit redlined versions representing their preferences. The RFP shall specify which terms in the proposed forms of contract are subject to negotiation or alternative proposals, or from which a bidder may request exceptions.

B.

Content of the RFP

Part IV.B.5 requires that the RFP contain the following content, along with that set forth in the Stipulated Framework:

- a. Information on the relationship between an electric utility and its affiliate, and the circumstances under which an electric utility's affiliate may participate;
- b. An explanation of the procedures by which any person may present to the commission positions that differ from those of the independent observer; and
- c. A statement that if disputes arise under the Framework, the dispute resolution process established in the Framework will control.

See Framework, Part IV.B.5.

This information will allow bidders to make judgments about the neutrality of the process.

C.

Commission Review of the RFP

Part IV.B.6.e of the Framework describes the procedure for commission review of the RFP. Specifically, the commission will receive the independent observer's comments and recommendations simultaneously with the utility's submittal of the RFP. The utility then may proceed with the RFP thirty (30) days after the commission receives both the proposed RFP and the independent observer's comments and recommendations, whichever is later, if the commission does not act.

Part IV.B.10 of the Framework requires independent observer review and comment on a utility's modification of its RFP. The utility may issue the modified RFP thirty (30) days after the commission has received the modifications and independent observer's comments, unless directed otherwise by the commission. Without this safeguard, the modification could supersede, and render irrelevant, the commission's approval of the original RFP.

D.

Bid Evaluation and Selection Criteria

At Part IV.E of the Framework, the commission makes it clear that the bid evaluation and selection criteria shall be described in the RFP, so that bidders know what project characteristics are valued by the utility.

Part III.E.7 of the Stipulated Framework states that the evaluation should consider "[t]he amount of purchased power

that a utility already has on its system, and the impacts that increasing the amount of purchased power may have[.]" The commission made this criterion more specific by requiring: (1) a focus on reliability and dispatchability; and (2) that the RFP describe a methodology. See Framework, Part IV.E.7. Otherwise, there will be too much utility discretion and no ready means of reviewing it. A separate paragraph addresses the financial effects of the amount of purchased power on the utility's system, and similarly requires that the RFP describe a methodology. See Framework, Part IV.E.8; see also Part IV.E.6.

Part III.E.10 of the Stipulated Framework left the utility with the discretion not to specify "fully" the weights for each non-price criterion. The commission modified this passage to require commission approval of a utility's decision not to specify "fully." Whether the commission approves or does not approve less than full specification, "the RFP must specify likely areas of non-price evaluation, and the evaluation process must be closely monitored and publicly reported on by the independent observer." Framework, Part IV.E.10.

E.

Contract Negotiations

The Stipulated Framework provides for the monitoring of a utility's contract interactions with its affiliate by the independent observer. The commission expands on this mandate by requiring that the independent observer monitor negotiations with

the winning bidder or competitive negotiations amongst short list bidders.

F.

Fairness and Transparency

The commission made several modifications to Part III.H of the Stipulated Framework, governing fairness and transparency.

The commission deleted the following sentence from Part III.H.1 of the Stipulated Framework: "However, at no time shall the issue of fairness to bidders create an undue burden on ratepayers or the host electric utility's shareholders." Assuming that "fairness" means competition on the merits, the sentence implies that the process can depart from competition on the merits, to avoid undue burden on the utility's ratepayers or shareholders. To this concept, the commission has a simple response: if competition on the merits is not feasible, the commission will grant a waiver from the competitive bidding process. Hawaii cannot attract bidders to competitions that are only "half-fair." If competition for a particular project cannot be exclusively on the merits, the commission should waive the bidding obligation. Otherwise, bidders will have to speculate on whether a particular competition is worth entering. Under the commission's approach, bidders will always know that if they are invited to compete, it will be on the merits.

Part III.H.3 of the Stipulated Framework seeks discretion for the utility to determine when to use a "closed" or "open" bidding process. This proposal raises troublesome issues.

If the utility is judging its own bid or that of an affiliate, and using subjective criteria and judgment, and if the model containing the assumptions and reflecting these judgments is closed, bidders lack a basis for trusting the process. Unlike other aspects of the Framework, there would be no ready way to discover bias, let alone hold the utility accountable for it.

In response, the commission has added Part IV.H.4 to its Framework, requiring that if the utility chooses to utilize a "closed" process:

- a. The electric utility shall explain why the benefits of closure exceed the cost in terms of diminution in the bidders' trust in the process;
- b. The Independent Observer must understand the model and observe the entire analysis; and
- c. After the utility has selected a bidder, any losing bidder must receive sufficient and timely access to the model (but not the bidding information) to be able to replicate the analysis as it applied to its bid.

See Framework, Part IV.H.4.

This approach, the commission emphasizes, creates a reasonable balance between allowing the utility discretion and protecting against any perceptions of bias.

Part IV.H.5 of the Framework limits the utility's ability to consider bids from its affiliate. Utility preference for the affiliate, for reasons other than the merits, is a risk that no bidder wants to take. The success of competitive bidding therefore depends on eliminating any chance of such preference.

Moreover, given the small size of Hawaii's utilities and their staffs (note that the HECO Utilities argue that this small size precludes having duplicate staffs, one for preparing

bids and the other for evaluating them), it is necessary to ensure that the employees devote their full attention to the utility's legal obligation to provide reliable electric service at a reasonable cost. They should not be distracted by opportunities to do the same work for an affiliate. Otherwise, there will be an incentive for the parent holding company to move resources from the electric utility to the affiliate, to the disadvantage of the utility's customers. The Framework therefore provides:

An electric utility may consider a bid from its affiliate if the Commission determines, prior to commencement of the competitive bidding process, that the affiliate has no advantage due to its past or present relationship to the electric utility. Such an advantage includes, but is not limited to, having employees who, due to their former employment with the electric utility, have knowledge about the electric utility's needs not readily available to the employees of non-electric utility bidders. The restriction on electric utility purchases from an affiliate set forth in this paragraph does not apply when the affiliate is a qualifying facility exercising its mandatory sales rights under PURPA.

Framework, Part IV.H.5.

To this principle, the commission is compelled by law to create an exemption for PURPA facilities. As the HECO Utilities explained in their opening brief, a QF, whether affiliated or not, has a right to sell to the utility at the utility's avoided cost. The commission is preempted by PURPA from restricting this right. The language above therefore applies only to non-QF affiliates. (See Section III.D, Treatment of PURPA "Qualifying Facilities," of this Decision and Order, above.)

G.

Code of Conduct

While Part III.H.8.b(ii) of the Stipulated Framework provides that the electric utility "should develop and follow a Code of Conduct," it did not address its content. The commission therefore specifies certain principles for the Code of Conduct. These principles differ from the HECO Utilities' position in three respects:

- (i) The electric utility shall establish internally a separate project team to undertake the evaluation;
- (ii) No evaluation team member shall have any involvement with the electric utility self-build option or any career path that could be affected by such team member's evaluation;
- (iii) During the RFP design and bid evaluation process, there shall be no oral or written contacts between the employees preparing the bid and the electric utility's employees responsible for bid evaluation, other than contacts authorized by the Code of Conduct and the RFP[.]

See Framework, Part IV.H.9.c(i) - (iii).

The Code of Conduct shall be submitted to the commission for review and approval well in advance of future generation need. (See Section IV.A.1 of this Decision and Order, above, discussing the Code of Conduct.) Finally, the Framework requires that a company officer certify that all of its employees have complied with the Code of Conduct after each competitive process is completed.

The HECO Utilities contend that its small size, and the need for employees to play multiple roles for multiple utilities, make these types of requirements impractical. They further note that while they are able to hire consultants, the pool of

knowledgeable consultants is limited because of Hawaii's unique characteristics. In response, the commission finds that, absent separateness in some form, bidder confidence will be reduced, to the detriment of the competitive bidding process. With sufficient notice of resource needs, the affected utilities will have time to extend the staff as necessary.

H.

Transmission Interconnection and Upgrades

Part IV.I of the Framework is a new provision that addresses interconnection and transmission upgrades. The interconnection and transmission upgrade process is technically complex, calling for many subjective judgments by the utility's planners. Part IV.I makes it explicit that the utility must offer interconnection and transmission upgrades to bidders on a basis comparable to what the utility provides to its own plants. In addition, the utility must submit for the commission's review and approval tariffs for interconnection and transmission upgrades required by Part IV.I of the Framework. See Framework, Part III.B.6; and Part IV.I.4.

VI.

Dispute Resolution Process

The Stipulating Parties propose to make the commission the "arbiter of last resort." The commission has modified this proposal to delineate the limitations on the commission's role in the competitive bidding process.

The commission will resolve disputes using an informal expedited process, involving time limits and delegated authority. In this role, the commission will lend its neutral offices, but it will not create any new legal rights. Generally, outside of PURPA, the commission has no legal obligation to resolve commercial disputes. Its sole legal responsibility is to ensure that the utilities act consistently within the Framework. See Framework, Part III.B.8.

In fact, outside of PURPA and absent this Framework, the utility owes no legal duty to any bidder. The purpose of a commission dispute resolution process is not to create new legal rights or obligations, but to make the competitive bidding process attractive to bidders. It will be attractive if bidders know there is an alert independent observer, and a neutral person within the commission ready to resolve disputes rapidly.

VII.

Participation by the Host Utility

Part VI of the Framework obligates the utility to offer a self-build bid for resources needed for reliability, unless the commission grants a waiver. The commission agrees with HREA's argument that a utility's bid introduces potential for bias. But on this issue, the commission has no alternative. The utility is the only entity with a legal obligation to serve the public. The commission cannot undermine this legal obligation by limiting the ways in which the utility may carry it out.

Another reason for requiring the utility self-build option is ratepayer benefit: the utility's project might be the best one; and whether it is or not, its presence in the mix will pressure bidders to polish their bids. There is also a risk that if a self-build bid is not obligatory, the utility could hold back, reject all other bids, and then proceed with a less efficient proposal (since the utility no longer would face competitive pressure).

As stated in Part VI.A.2.a of the Framework, the commission will consider a waiver of the obligatory self-build bid if the utility demonstrates "why relying on the market to provide the needed resource is prudent, and such demonstration shall include evidence of the number of viable sellers the utility expects will compete[.]" In that situation, the utility also must develop a Contingency Plan, and if necessary, a Parallel Plan.

VIII.

Ratemaking

A utility's self-build bid creates a difficult question of cost recovery. The independent bidder's cost recovery is bounded by its bid; if its bid wins but its costs later rise, the bidder must absorb the difference (unless its bid provided for recovery). Faced with this risk of absorption, the bidder will raise its bid price. The utility, in contrast, has a statutory right to seek rate increases to reflect costs that exceed its

bid. Unless those costs reflect imprudence, the commission will be under legal pressure to approve them.³⁶

These facts reveal a fundamental asymmetry: the utility can bid low because it can seek extra recovery later; the non-utility must bid high due to the risk of living with its bid. The commission's solution, not ideal but workable, is that the evaluation of the utility's bid must apply risk factors addressing the probability that later costs will exceed the original bid. Such evaluation must be monitored by the independent observer. The commission recognizes that the utility's analysts will hesitate to admit to the probability of cost overruns; but the commission will look skeptically at any suggestion that the probability is zero.

IX.

Orders

THE COMMISSION ORDERS:

1. The attached proposed Framework to govern competitive bidding as a mechanism for acquiring or building new generation in the State is hereby issued. The Parties shall submit comments to the commission on the proposed Framework, no later than July 31, 2006. Any comments submitted shall also address the issues set forth in Section III.D of this Decision and Order.
2. Further commission action will follow.

³⁶But see Duquesne Power & Light v. Barasch, 488 U.S. 299 (1989) (United States Constitution does not require rate recovery of all prudent costs).

DONE at Honolulu, Hawaii JUN 30 2006.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By Carlito P. Caliboso
Carlito P. Caliboso, Chairman

By (EXCUSED)
Wayne H. Kimura, Commissioner

By Janet E. Kawelo
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:

Michael Azama
Michael Azama
Commission Counsel

03-0372.s1

FRAMEWORK FOR COMPETITIVE BIDDING
Proposed: June 30, 2006

STATE OF HAWAII
PUBLIC UTILITIES COMMISSION

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**STATE OF HAWAII
PUBLIC UTILITIES COMMISSION**

**FRAMEWORK FOR COMPETITIVE BIDDING
Proposed: June 30, 2006**

I. DEFINITIONS

As used in this Framework, unless the context clearly requires otherwise:

"Approved IRP" means an electric utility's IRP that has been approved by the Commission in the utility's IRP proceeding. As of the effective date of this Framework, the status of each utility's IRP is as follows: (1) on October 28, 2005, Hawaiian Electric Company, Inc. filed its 3rd IRP in In re Hawaiian Elec. Co., Inc., Docket No. 03-0253; (2) Maui Electric Company, Ltd. is scheduled to file its 3rd IRP by October 31, 2006, in In re Maui Elec. Co., Ltd., Docket No. 04-0077; (3) Hawaii Electric Light Company, Inc. is scheduled to file its 3rd IRP by December 29, 2006, in In re Hawaii Elec. Light Co., Inc., Docket No. 04-0046; and (4) on June 20, 2006, the Commission opened a proceeding for Kauai Island Utility Cooperative's 3rd IRP in In re Kauai Island Util. Coop., Docket No. 2006-0165.

"CIP Approval Requirements" means the procedure set forth in the Commission's General Order No. 7, Standards for Electricity Utility Service in the State of Hawaii, Paragraph 2.3(g), as modified by In re Kauai Island Util. Coop., Docket No. 03-0256, Decision and Order No. 21001, filed on May 27, 2004, and In re Hawaiian Elec. Co., Inc., Hawaii Elec. Light Co., Inc., and Maui Elec. Co., Ltd., Docket No. 03-0257, Decision and Order No. 21002, filed on May 27, 2004. "In general, [the] commission's analysis of capital expenditure applications involves a review of whether the project and its costs are reasonable and consistent with the public interest, among other factors. If the commission approves the [electric] utility's application, the commission in effect authorizes the utility to commit funds for the project, subject to the proviso that 'no part of the project may be included in the utility's rate base unless and until the project is in fact installed, and is used and useful for public utility purposes.'" Decision and Order No. 21001, at 12; and Decision and Order No. 21002, at 12.

"Code of Conduct" means a written code developed by the host electric utility and approved by the Commission to ensure the fairness and integrity of the competitive bidding process, in particular where the host utility or its affiliate seeks to advance its own resource proposal in response to an RFP. The "Code of Conduct" is more fully described in Part IV.H.9.c of the Framework.

"Commission" means the Public Utilities Commission of the State of Hawaii.

"Competitive bid" or "competitive bidding" means the mechanism established by this Framework for acquiring a future energy generation resource or a block of generation resources by an electric utility.

"Consumer Advocate" means the Division of Consumer Advocacy of the Department of Commerce and Consumer Affairs, State of Hawaii.

"Contingency Plan" means an electric utility's plan to provide either temporary or permanent generation or load reduction programs to address a near-term need for capacity as a result of an actual or expected failure of an RFP process to produce a viable project proposal, or of a project selected in an RFP. The utility's Contingency Plan may be different from the utility's Parallel Plan and the utility's bid. The term "utility's bid," as used herein, refers to a utility's proposal advanced in response to a need that is addressed by its RFP.

"Electric utility" or "utility" means a provider of electric utility service that is regulated by and subject to the Commission's jurisdiction pursuant to Chapter 269, HRS, as amended.

"FERC" means the Federal Energy Regulatory Commission.

"Framework" means the Framework for Competitive Bidding adopted by the Commission in Docket No. 03-0372.

"HAR" means the Hawaii Administrative Rules, as amended.

"HRS" means the Hawaii Revised Statutes, as amended.

"Independent Observer" means the neutral person or entity retained by the electric utility to monitor the utility's competitive bidding process, and to advise the utility and Commission on matters arising out of the competitive bidding process, as described in Part III.C of the Framework. To the extent applicable, "Independent Observer" also means a neutral person or entity that is an expert in interconnection and transmission upgrades, pursuant to Part IV.I.5 of the Framework.

"IPP" means an independent power producer that is not subject to the Commission's regulation or jurisdiction as a public utility.

"IRP" means an electric utility's Integrated Resource Plan that has been submitted to the Commission for review and approval in the utility's IRP proceeding, in accordance with the Commission's IRP Framework. The overall goal of integrated resource planning is the identification of the resources or the mix of resources for meeting near and long-term customer energy needs in an efficient and reliable manner at the lowest reasonable cost. Each electric utility is responsible for developing an IRP that meets the energy needs of its customers. The IRP Framework requires each electric utility to develop a long-range, twenty (20)-year plan and a medium-range five (5)-year action plan to be submitted on a

three (3)-year planning cycle for the Commission's review and approval. The IRP process is a vehicle for the Commission, the electric utilities, energy stakeholders, and the public to understand and influence the planning process involved in identifying and evaluating the mix of demand-side and supply-side energy resources needed to meet near and long-term energy needs in an efficient and reliable manner at the lowest reasonable cost.

"IRP Framework" means the Commission's Framework for Integrated Resource Planning, dated May 22, 1992, as amended by In re Public Util. Comm'n, Docket No. 05-0075, Decision and Order No. 22490, filed on May 26, 2006.

"Parallel Plan" means the generating unit plan (comprised of one or multiple generation resources) that is pursued by the electric utility in parallel with a third-party project selected in an RFP until there is reasonable assurance that the third-party project will reach commercial operation, or until such action can no longer be justified to be reasonable. The utility's Parallel Plan unit(s) may be different from that proposed in the utility's bid. The term "utility's bid," as used herein, refers to a utility's proposal advanced in response to a need that is addressed by its RFP.

"PPA" means a power purchase agreement or contract to purchase firm capacity, energy, or both, from an electric utility, pursuant to the terms of this Framework.

"PURPA" means the Federal Public Utility Regulatory Policies Act of 1978, as amended.

"RFP" means a written request for proposal issued by the electric utility to solicit bids from interested third-parties, and where applicable from the utility or its affiliate, to supply a future generation resource or a block of generation resource to the utility pursuant to the competitive bidding process.

II. CONTEXT FOR COMPETITIVE BIDDING

A. USE OF COMPETITIVE BIDDING

1. This Framework applies to electric utilities regulated by and subject to the Commission's jurisdiction pursuant to Chapter 269, HRS.
2. A determination shall be made by the Commission in a utility's IRP proceeding as to whether a competitive bidding process shall be used to acquire a future generation resource or a block of generation resources.
3. Competitive bidding, unless the Commission finds it to be unsuitable, is established as the required mechanism for acquiring a future generation resource or a block of generation resources, whether or not such resource has been identified in a utility's IRP. The basis for such a finding shall be explained by the utility in its IRP, and the determination shall be made by

the Commission in its review of the utility's IRP. See Part II.C, below. The following conditions and possible exceptions apply:

- a. Competitive bidding will benefit Hawaii when it: (i) facilitates an electric utility's acquisition of supply-side resources in a cost-effective and systematic manner; (ii) offers a means by which to acquire new generating resources that are overall lower in cost or better performing than the utility could otherwise achieve; (iii) does not negatively impact the reliability or unduly encumber the operation or maintenance of Hawaii's unique island electric systems; (iv) promotes electric utility system reliability by facilitating the timely acquisition of needed generation resources and allowing the utility to adjust to changes in circumstances; and (v) is consistent with IRP objectives.
- b. Under certain circumstances, to be considered by the Commission in the context of an electric utility's request for waiver under Part II.A.4, below, competitive bidding may not be appropriate. These circumstances include: (i) when competitive bidding will unduly hinder the ability to add needed generation in a timely fashion; (ii) when the utility and its customers will benefit more if the generation resource is owned by the utility rather than by a third-party (for example, when reliability will be jeopardized by the utilization of a third-party resource); (iii) when more cost-effective or better performing generation resources are more likely to be acquired more efficiently through different procurement processes; or (iv) when competitive bidding will impede or create a disincentive for the achievement of IRP goals, renewable energy portfolio standards or other government objectives and policies, or conflict with requirements of other controlling laws, rules, or regulations.
- c. Other circumstances that could qualify for a waiver include: (i) the expansion or repowering of existing utility generating units (provided that a waiver means the electric utility need not conduct competitive bidding for the job of expansion or repowering; and provided further that the waiver will not relieve the electric utility of an obligation to seek competitive bids for alternative means of supplying the capacity to be made available by the repowering or expansion); (ii) the renegotiation of existing power purchase agreements; (iii) the acquisition of near-term power supplies for short-term needs; (iv) the acquisition of power from a non-fossil fuel facility (such as a waste-to-energy facility) that is being installed to meet a governmental objective; and (v) the acquisition of power supplies needed to respond to an emergency situation.

- d. Furthermore, the Commission may waive this Framework or any part thereof upon a showing that the waiver will likely result in a lower cost supply of electricity to the utility's general body of ratepayers, increase the reliable supply of electricity to the utility's general body of ratepayers, or is otherwise in the public interest.
 - e. This Framework does not apply to: (i) the three utility projects currently being developed: Hawaiian Electric Company, Inc.'s Campbell Industrial Park CT-1, Hawaii Electric Light Company, Inc.'s Keahole ST-7, and Maui Electric Company, Ltd.'s Maalaea M-18; and (ii) offers to sell energy on an as-available basis by non-fossil fuel generation producers that are under review by an electric utility at the time this Framework is adopted. The offers to sell energy that are exempt from this Framework under Sub-part II.A.3.e.(ii) are limited to those that are set forth in: the Kauai Island Utility Cooperative's Oral Argument Hearing Exhibit A, dated June 19, 2006; and the list from Hawaiian Electric Company, Inc., Hawaii Electric Light Company, Inc., and Maui Electric Company, Ltd., submitted to the Commission and Consumer Advocate under confidential protective order on June 27, 2006.
 - f. When a competitive bidding process will be used to acquire a future generation resource or a block of generation resources, the generating units acquired under a competitive bidding process must meet the needs of the utility in terms of the reliability of the generating unit, the characteristics of the generating unit required by the utility, and the control the utility needs to exercise over operation and maintenance in order to reasonably address system integration and safety concerns.
4. The procedure for seeking a waiver is as follows:
- a. Applications for waivers, and transition to competitive bidding requirements for new generation projects.
 - (i) For proposed generation projects included in, or consistent with, IRPs approved by the Commission prior to the effective date of this Framework, the electric utility shall file an application for waiver with the Commission, and obtain Commission approval of the waiver request prior to expending or committing any funds or resources relating to the proposed generation project.
 - (ii) For proposed generation projects included in, or consistent with, the IRP filed for Commission approval in In re Hawaiian Elec. Co., Inc., Docket 03-0253, the electric

utility shall file any waiver request no later than sixty (60) days following a Commission order approving the IRP.

- (iii) For all proposed generation projects included in, or consistent with, IRPs that have not yet been filed with the Commission for approval as of the effective date of this Framework, any waiver request shall accompany the filing of the proposed IRP for the Commission's approval.
 - (iv) An electric utility that seeks a waiver shall take all steps reasonably required to submit its application for waiver as soon as practicable such that, in the event the Commission denies the request, sufficient time remains to conduct competitive bidding without imprudently risking system reliability.
- b. In no event shall a Commission decision granting a waiver be construed as determinative of whether an electric utility acted prudently in the matter.
5. Exemption - ownership structure of an electric utility. Upon a showing that an entity has an ownership structure in which there is no substantial difference in economic interests between its owners and its customers, such that the electric utility has no disincentive to pursue new generation projects through competitive bidding, the Commission will exempt such entity from this Framework.

B. SCOPE OF COMPETITIVE BIDDING

- 1. An electric utility's IRP shall specify the proposed scope of the RFP for any specific generation resource or block of generation resources that the IRP states will be subject to competitive bidding.
- 2. Competitive bidding shall enable the comparison of a wide range of supply-side options, including PPAs, utility self-build options, turnkey arrangements (i.e., build and transfer options), and tolling arrangements where practical.
- 3. Each electric utility shall take steps to provide notice of its RFPs, and to encourage participation from a full range of prospective bidders. PURPA qualifying facilities, IPPs, the host utility, and its affiliates, and other utilities shall be eligible to participate in any supply-side RFP.
- 4. Competitive bidding processes may vary by resource type, provided those processes are consistent with this Framework. For instance, solicitation processes for distributed generation facilities may be different from those

for central station generating supplies. An electric utility may establish a separate procurement process (such as a "set aside" or separate RFP process) to acquire as-available or firm capacity from renewable generating facilities.

5. RFP processes shall be flexible, and shall not include unreasonable restrictions on sizes and types of projects considered, taking into account the appropriate sizes and types identified in the IRP process.

C. RELATIONSHIP TO INTEGRATED RESOURCE PLANNING

1. The Commission's IRP Framework applicable to each electric utility shall continue to be used to set the strategic direction of resource planning by the electric utilities. In order for competitive bidding to be effectively and efficiently integrated with a utility's IRP, stakeholders must work cooperatively to identify and adhere to appropriate timelines, which may need to be expedited.
2. This Framework is intended to complement the Commission's IRP Framework.
3. A determination shall be made by the Commission in an IRP proceeding as to whether a competitive bidding process shall be used to acquire a generation resource or a block of generation resources that is included in the IRP. Actual competitive bidding for IRP-designated resources will occur after the IRP is approved, through an RFP, which is consistent with the IRP approved by the Commission.
4. Integration of competitive bidding into IRP. The general approach to integration has four parts, in sequence:
 - a. The electric utility conducts an IRP process, culminating in an IRP that identifies a preferred resource plan (including capacity, energy, timing, technologies, and other preferred attributes). This IRP shall identify those resources for which the utility proposes to hold competitive bidding, and those resources for which the utility seeks a waiver from competitive bidding, and shall include an explanation of the facts supporting a waiver, based on the waiver criteria set forth in Part II.A.3, above.
 - b. The Commission approves, modifies, or rejects the IRP, including any requests for waiver, under the IRP Framework and this Framework.
 - c. The electric utility conducts a competitive bidding process, consistent with the IRP; such process shall include the advance

filing of a draft RFP with the Commission, which shall be consistent with the IRP.

- d. The electric utility selects a winner from the bidders. (But see Part II.C.6, below, concerning the process when there are no bidders worth choosing.).
5. An evaluation of bids in a competitive bidding process may reveal desirable projects that were not included in an approved IRP. These projects may be selected if it can be demonstrated that the project is consistent with an approved IRP and that such action is expected to benefit the utility and its ratepayers.
6. An evaluation of bids in a competitive bidding process may reveal that the acquisition of any of the resources in the bid will not assist the utility in fulfilling its obligations to its ratepayers. In such a case, the utility may determine not to acquire such resources and shall notify the Commission accordingly. Such notification shall include: (a) an explanation of why the competitive bidding process failed to produce a viable project; and (b) a description of what actions the electric utility intends to take to replace the resource sought through the unsuccessful competitive bidding process.

D. MITIGATION OF RISKS ASSOCIATED WITH COMPETITIVE BIDDING

1. To carry out its competitive bidding obligations consistently with its resource sufficiency obligations, the electric utility must conduct, or consider conducting, three types of activities: self-build, parallel planning, and contingency planning. The utility's self-build obligation is addressed in Parts VI.A.1 and VI.C, below. The electric utility's parallel planning and contingency planning activities are discussed in Parts II.D.2 to II.D.4, below.
2. In consideration of the isolated nature of the island utility systems, the utility may use a Parallel Plan option to mitigate the risk that an IPP's option may fail. Under this Parallel Plan option, the utility may continue to proceed with its Parallel Plan until it is reasonably certain that the awarded IPP project will reach commercial operation, or until such action can no longer be justified to be reasonable. The electric utility shall use prudent electric utility practices to determine the nature, amount, and timing of the parallel planning activities, and take into account (without limitation) the cost of parallel planning and the probability of third-party failure. The electric utility's Parallel Plan unit(s) may differ from that proposed in the electric utility's bid. For each project that is subject to competitive bidding, the electric utility shall submit a report on the cost of parallel planning upon the Commission's request.

3. The electric utility may require bidders (subject to the Commission's approval with other elements of a proposed RFP) to offer the utility the option to purchase the project under certain conditions or in the event of default by the seller (i.e., the bidder), subject to commercially reasonable payment terms.
4. The utility's Contingency Plan need not be the resource identified as the preferred resource in its approved IRP Plan.

III. ROLES IN COMPETITIVE BIDDING

A. ELECTRIC UTILITY

1. The role of the host electric utility in the competitive bidding process shall include:
 - a. Designing the solicitation process, establishing evaluation criteria consistent with its overall IRP objectives, and specifying timelines;
 - b. Designing the RFP documents and proposed forms of PPAs and other contracts;
 - c. Implementing and managing the RFP process, including communications with bidders;
 - d. Evaluating the bids received;
 - e. Selecting the bids for negotiations based on established criteria;
 - f. Negotiating contracts with selected bidders;
 - g. Determining, where and when feasible, the interconnection facilities and transmission upgrades necessary to accommodate new generation;
 - h. Competing in the solicitation process with a self-build option, unless a waiver is granted; and
 - i. Providing the Independent Observer with all requested information.
2. In designing each competitive bidding process, each electric utility shall:
 - (a) take all prudent steps to obtain information on the experiences of similarly-situated utilities and utilities that have conducted competitive

bidding processes to address similar needs; and (b) take all prudent steps to take full advantage of available industry sources of related information. "All prudent steps" includes identifying and using best practices.

3. Access to Utility Sites. The utility shall consider, on a case-by-case basis before an RFP is issued, offering one or several utility-owned or controlled sites to bidders in each competitive bidding process. The utility shall consider such factors as:
 - a. The anticipated specific non-technical terms of potential proposals. An example of one factor that will need to be examined is whether benefits will be expected from a "turnkey" project that the utility will or may eventually own and operate.
 - b. The feasibility of the installation. Examples of the factors that may need to be examined in order to evaluate the feasibility of the installation may include, but are not be limited to the following:
 - i. Specific physical and technical parameters of anticipated non-utility installations, such as the technology that may be installed, space and land area requirements, topographic, slope and geotechnical constraints, fuel logistics, water requirements, number of site personnel, access requirements, waste and emissions from operations, noise profile, electrical interconnection requirements, and physical profile; and
 - ii. How the operation, maintenance, and construction of each installation will affect factors such as security at the site, land ownership issues, land use and permit considerations (e.g., compatibility of the proposed development with present and planned land uses), existing and new environmental permits and licenses, impact on operations and maintenance of existing and future facilities, impact to the surrounding community, change in zoning permit conditions, and safety of utility personnel.
 - c. The utility's anticipated future use of the site. Examples of why it may be beneficial for the utility to maintain site control may include, but are not limited to the following: (i) to ensure that power generation resources can be constructed to meet system reliability requirements; (ii) to retain flexibility for the utility to perform crucial parallel planning for a utility owned option to back-up the unfulfilled commitments, if any, of third-party developers of generation; and (iii) to retain the flexibility for the utility to acquire the unique efficiency gains of combined-cycle

conversions and repowering projects of existing utility simple-cycle combustion turbines and steam fired generating facilities, respectively.

- d. The effect on competitive forces of denying bidders the ability to use the site, taking into account whether the unavailability of adequate sites for non-utility bidders gives the electric utility a competitive advantage.
 - e. Where the utility has chosen not to offer a site to a third-party, the electric utility shall present its reasons, specific to the project and sites at issue, in writing to the Independent Observer and the Commission.
- 4. The utility shall submit to the Commission for review and approval (subject to modification if necessary), a Code of Conduct described in Part IV.H.9.c, below, prior to the commencement of any competitive bid process under this Framework.

B. HAWAII PUBLIC UTILITIES COMMISSION

- 1. The primary role of the Commission is to ensure that: (a) each competitive bidding process conducted pursuant to this Framework is fair in its design and implementation so that selection is based on the merits; (b) projects selected through competitive bidding processes are consistent with the utility's approved IRP; (c) the electric utility's actions represent best practices; and (d) throughout the process, the utility's interests are aligned with the public interest even where the utility has dual roles as designer and participant.
- 2. The Commission will review, and at its option, approve or modify, each proposed RFP before it is issued, including any proposed form of contracts and other documentation that will accompany the RFP.
- 3. The Commission shall be the final arbiter of disputes that arise among parties in relation to a utility's competitive bidding process, to the extent described in Part V, below.
- 4. The Commission shall review, and approve or reject, the contracts that result from competitive bidding processes conducted pursuant to this Framework, in a separate docket upon application by the utility in which the expedited process in Part III.B.8 shall not apply. In reviewing such contracts, the Commission may establish review processes that are appropriate to the specific circumstances of each solicitation, including the time constraints that apply to each commercial transaction.

5. If the utility identifies its self-build or turnkey project as superior to bid proposals, the utility shall seek Commission approval in keeping with established CIP Approval Requirements.
6. The Commission shall review and approve (and modify if necessary), the electric utility's tariffs for interconnection and transmission upgrades required by Part IV.I of this Framework.
7. The Commission shall review any complaint that the electric utility is not complying with the Framework, pursuant to Part V.
8. Timely Commission review, approval, consent, or other action described in this Framework is essential to the efficient and effective execution of this competitive bidding process. Accordingly, to expedite Commission action in this competitive bidding process, whenever Commission review, approval, consent, or action is required under this Framework, the Commission may do so in an informal expedited process. The Commission hereby authorizes its Chairman, or his designee (which designee, may be another Commissioner, a member of the Commission staff, Commission hearings officer, or a Commission hired consultant), in consultation with other Commissioners, Commission staff, and the Independent Observer, to take any such action on behalf of the Commission.

C. INDEPENDENT OBSERVER

1. An Independent Observer is required whenever the utility or its affiliate seeks to advance a project proposal (i.e., in competition with those offered by bidders) in response to a need that is addressed by its RFP, or when the Commission otherwise determines. An Independent Observer will monitor the competitive bidding process and will report on the progress and results to the Commission, sufficiently early so that the Commission is able to address any defects and allow competitive bidding to occur in time to meet capacity needs. Any interaction between a utility and its affiliate during the course of a solicitation process, beginning with the preparation of the RFP, shall be closely monitored by the Independent Observer. Specific tasks to be performed by the Independent Observer shall be identified by the utility in its proposed RFP and as may be required by the Commission.
2. Independent Observer obligations. The Independent Observer will have duties and obligations in two areas: Advisory and Monitoring.
 - a. Advisory. The Independent Observer shall:

- (i) Certify to the Commission that at each of the following steps, the electric utility's judgments created no unearned advantage for the electric utility or any affiliate:
 - (1) Pre-qualification criteria;
 - (2) RFP;
 - (3) Model PPA to be attached to the RFP;
 - (4) Code of Conduct;
 - (5) Selection criteria;
 - (6) Evaluation of bids; and
 - (7) Final decision to purchase power or proceed with self-build option.
- (ii) Advise the electric utility on its decision-making during, and with respect to, each of the electric utility's actions listed in the preceding item;
- (iii) Report immediately to the electric utility's executive in charge of ensuring compliance with this Framework, and the Commission, any deviations from the Framework or violations of any procurement rules;
- (iv) After the electric utility's procurement selection is completed, provide the Commission with:
 - (1) An overall assessment of whether the goals of the RFP were achieved, such goals to include without limitation the attraction of a sufficient number of bidders and the elimination of actual or perceived utility favoritism for its own or an affiliate's project; and
 - (2) Recommendations for improving future competitive bidding processes.
- (v) Be available to the Commission as a witness if required to evaluate a complaint filed against an electric utility for non-compliance with this Framework, or if required in a future rate case if questions of prudence arise.

b. Monitoring. The Independent Observer shall:

- (i) Monitor all steps in a competitive bidding process, beginning with the preparation of the RFP, or at such earlier time as determined by the Commission;

- (ii) Monitor communications (and communications protocols) with bidders;
 - (iii) Monitor adherence to codes of conduct;
 - (iv) Monitor contract negotiations with bidders;
 - (v) Monitor all interactions between the electric utility and its affiliate, during all events affecting a solicitation process, if the affiliate may be a bidder; and
 - (vi) Report to the Commission on monitoring results during each stage of the competitive process, sufficiently early so that the Commission can correct defects or eliminate uncertainties without endangering project milestones.
3. The Independent Observer shall have no decision-making authority, and no obligation to resolve disputes, but may offer to mediate between disputing parties.
 4. The Independent Observer shall provide comments and recommendations to the Commission, at the Commission's request, to assist in resolving disputes or in making any required determinations under this Framework.
 5. Independent Observer qualifications. The Independent Observer shall be qualified for the tasks the observer must perform. Specifically, the Independent Observer shall:
 - a. Be knowledgeable about, or be able rapidly to absorb knowledge about, any unique characteristics and needs of the electric utility;
 - b. Be knowledgeable about the characteristics and needs of small, non-interconnected island electric grids, and be aware of the unique challenges and operational requirements of such systems;
 - c. Have the necessary experience and familiarity with utility modeling capability, transmission system planning, operational characteristics, and other factors that affect project selection;
 - d. Have a working knowledge of common PPA terms and conditions, and the PPA negotiations process;
 - e. Be able to work effectively with the electric utility, the Commission, and its staff during the bid process; and
 - f. Be able to demonstrate impartiality.

6. Selection and contracting. The electric utility shall: (a) identify qualified candidates for the role of Independent Observer (and also shall consider qualified candidates identified by the Commission and prospective participants in the competitive bidding process); (b) seek and obtain Commission approval of its final list of qualified candidates; and (c) select an Independent Observer from among the Commission-approved qualified candidates. The electric utility's contract with the Independent Observer shall be acceptable to the Commission, and provide, among other matters, that the Independent Observer: (a) report to the Commission and carry out such tasks as directed by the Commission, including the tasks described in this Framework; (b) cannot be terminated and payment cannot be withheld without the consent of the Commission; and (c) can be terminated by the Commission without the utility's consent, if the Commission deems it to be in the public interest in the furtherance of the objectives of this Framework to do so. The utility may recover prudently incurred Independent Observer costs from its customers upon approval of the Commission in a rate case or other appropriate proceeding.
7. As part of the RFP design process, the utility shall develop procedures to be included in the RFP by which any participant in the competitive bidding process may present to the Commission, for review and resolution, positions that differ from those of the Independent Observer (i.e., in the event the Independent Observer makes any representations to the Commission upon which the participant does not agree).

IV. THE REQUEST FOR PROPOSALS PROCESS

A. GENERAL

1. Competitive bidding shall be structured and implemented in a way that facilitates an electric utility's acquisition of supply-side resources identified in a utility's IRP in a cost-effective and systematic manner, consistent with state energy policy. All costs and benefits incurred or received by the utility and its customers shall be taken into account in the bid evaluation and selection process.
2. Competitive bidding shall be structured and implemented in a flexible and efficient manner that promotes electric utility system reliability by facilitating the timely acquisition of needed resources and allowing the utility to adjust to changes in circumstances.
 - a. The implementation of competitive bidding cannot be allowed to negatively impact reliability of the electric utility system.

- b. The generating units acquired under a competitive bidding process must meet the needs of the utility in terms of the reliability of the generating unit, the characteristics of the generating unit required by the utility, and the control the utility needs to exercise over operation and maintenance in order to minimize system integration concerns.
- 3. The competitive bidding process shall ensure that proposals and bidders are judged on the merits, without being unduly burdensome to the electric utilities and the Commission.
 - a. The competitive bidding process shall include an RFP and supporting documentation by which the utility sets forth the requirements to be fulfilled by bidders and describes the process by which it will: (i) conduct its solicitation; (ii) obtain consistent and accurate information on which to evaluate bids; (iii) implement a consistent and equitable evaluation process; and (iv) systematically document its determinations. The RFP shall also describe the role of the Independent Observer and bidders' opportunities for challenges and for dispute resolution.
 - b. When a utility advances its own project proposal (i.e., in competition with those offered by bidders) or accepts a bid from an affiliate, the utility shall take all reasonable steps, including any steps required by the Commission, to mitigate concerns over an unfair or unearned competitive advantage that may exist or reasonably be perceived by other bidders or stakeholders.
- 4. If an IPP, turnkey, or affiliate proposal is selected as a result of the RFP process, one or more contracts are the expected result. Proposed forms of PPAs and other contracts that may result from the RFP process (e.g., PPA for firm capacity, PPA for as-available energy, turnkey contract, etc.) shall be included with each RFP. The RFP shall specify whether any opportunity exists to propose or negotiate changes to the proposed form of PPA.

B. DESIGN OF THE COMPETITIVE BIDDING SOLICITATION PROCESS

- 1. The competitive bidding solicitation process shall include the following:
 - a. Design of the RFP and supporting documents;
 - b. Issuance of the RFP;
 - c. Development and submission of proposals by bidders;

- d. A "multi-stage evaluation process" to reduce bids down to a short list or "award group" (i.e., a process that includes, without limitation: (i) receipt of the proposals; (ii) completeness check; (iii) threshold or minimum requirements evaluation; (iv) initial evaluation including price screen/non-price assessment; (v) selection of a short list; (vi) detailed evaluation or portfolio development; and (vii) selection of award group for contract negotiation);
 - e. Contract negotiations (when a third-party bid is selected); and
 - f. Commission approval of any resulting contract.
- 2. The RFP shall identify any unique system requirements and provide information regarding the requirements of the utility, important resource attributes, and criteria used for the evaluation. For example, if the utility values dispatchability or operating flexibility, the RFP shall: (a) request that a bidder offer such an option; and (b) explain how the utility will evaluate the impacts of dispatchability or operational flexibility in the bid evaluation process.
- 3. The RFP (including the response package, proposed forms of PPAs and other contracts) shall describe the bidding guidelines, the bidding requirements to guide bidders in preparing and submitting their proposals, the general bid evaluation and selection criteria, the risk factors important to the utility, and, to the extent practicable, the schedule for all steps in the bidding process.
- 4. The utility may charge bidders a reasonable fee, to be reviewed by the Independent Observer, for participating in the RFP process.
- 5. Other Content of RFP. The RFP shall also contain:
 - a. Information on the relationship between an electric utility and its affiliate, and the circumstances under which an electric utility's affiliate may participate;
 - b. An explanation of the procedures by which any person may present to the Commission positions that differ from those of the Independent Observer; and
 - c. A statement that if disputes arise under this Framework, the dispute resolution process established in this Framework will control.

6. The process leading to the distribution of the RFP shall include the following steps (each step to be monitored and reported on by the Independent Observer), unless the Commission modifies this process for a particular competitive bid:
 - a. The utility designs a draft RFP, then files its draft RFP and supporting documentation with the Commission;
 - b. The utility holds a technical conference to discuss the draft RFP with interested parties (which may include potential bidders);
 - c. Interested parties submit comments on the draft RFP to the utility and the Commission;
 - d. The utility determines whether and how to incorporate recommendations from interested parties in the draft RFP;
 - e. The utility submits its final, proposed RFP to the Commission for its review and approval (and modification if necessary) according to the following procedure:
 - (i) The Independent Observer shall submit its comments and recommendations to the Commission concerning the RFP and all attachments, simultaneously with the electric utility's proposed RFP.
 - (ii) The utility shall have the right to issue the RFP if the Commission does not direct the utility to do otherwise within thirty (30) days after the Commission receives the proposed RFP and the Independent Observer's comments and recommendations.
7. A pre-qualification requirement is a requirement that a bidder must satisfy to be eligible to bid. A pre-qualification process may be incorporated in the design of some bidding processes, depending on the specific circumstances of the utility and its resource needs. Any pre-qualification requirements shall apply equally to independent bidders, the electric utility's self-build bid, and the bid of any utility's affiliate.
8. As part of the design process, the utility shall develop and specify the type and form of threshold criteria that will apply to bidders, including the utility's self-build proposals. Examples of potential threshold criteria include requirements that bidders have site control, maintain a specified credit rating, and demonstrate that their proposed technologies are mature.

9. The design process shall address credit requirements and security provisions, which apply to: (a) the qualification of bidders; and (b) bid evaluation processes.
10. The utility shall have the discretion to modify the RFP or solicit additional bids from bidders after reviewing the initial bids, provided that such discretion is clearly identified in the RFP and any modification is reviewed by the Independent Observer and submitted to the Commission along with the Independent Observer's comments. The electric utility may issue the modified RFP thirty (30) days after the Commission has received these materials, unless the Commission directs otherwise.
11. All involved parties shall plan, collaborate, and endeavor to complete the final RFP within ninety (90) days from the date the electric utility submits the draft RFP to the Commission.

C. FORMS OF CONTRACTS

1. The RFP shall include proposed forms of PPAs and other contracts, with commercially reasonable terms and conditions that properly allocate risks among the contracting parties in light of circumstances. The terms and conditions of the contracts shall be specified to the extent practical, so that bidders are aware of, among other things, performance requirements, pricing options, key provisions that affect risk allocation (including those identified in sub-paragraph 2 below), and provisions that may be subject to negotiation. Where contract provisions are not finalized or provided in advance of RFP issuance (e.g., because certain contract provisions must reflect features of the winning bidder's proposal such as technology or location), the RFP shall so indicate.
2. The provisions of a proposed contract shall address matters such as the following (unless inapplicable): (a) reasonable credit assurance and security requirements appropriate to an island system that reasonably compensates the utility and its customers if the project sponsor fails to perform; (b) contract buyout and project acquisition provisions; (c) in-service date delay and acceleration provisions; (d) liquidated damage provisions that reflect risks to the utility and its customers; and (e) contractual terms to allow for turnkey options.
3. The proposed contracts may allow the utility the option to request conversion of the plant to an alternate fuel if conditions warrant, with appropriate modifications to the contract to account for the bidder/seller's conversion costs and to assign the benefits of any lower fuel costs.
4. The RFP shall specify which terms in the proposed forms of contract are subject to negotiation or alternative proposals, or from which a bidder may

request exceptions. For these terms, bidders may submit alternative language as part of their bids, provided that any such variation is not inconsistent with any IRP which described the resource at issue.

D. ISSUANCE OF THE RFP AND DEVELOPMENT OF PROPOSALS

1. Each electric utility shall take steps to provide notice of its RFPs to, and encourage participation from, the full community of prospective bidders.
2. Bidders may be required to submit a "notice of intent to bid" to the electric utility.
3. The electric utility shall develop and implement a formal process to respond to bidders' questions.
4. The electric utility may conduct a bidders' conference.
5. The electric utility shall provide bidders with access to information through a website where it can post documents and information.
6. The process shall require all third-party bids to be submitted by the deadline specified in the RFP, except that the utility's self-bid shall be submitted one day in advance.
7. Bids may be deemed non-conforming if they do not meet or otherwise provide all of the information requested in an RFP. At the utility's discretion, in consultation with the Independent Observer, proposals that are non-conforming may be given additional time to remedy their non-conformity. The utility, in consultation with the Independent Observer, may decline to consider any bid that is non-conforming.

E. BID EVALUATION / SELECTION CRITERIA

1. The utility, monitored by the Independent Observer, shall compare bids received in response to an RFP to one another and to the utility's self-build project (or the generic resource identified in the IRP, if no self-build project proposal is being advanced).
2. The evaluation criteria and the respective weight or consideration given to each such criterion in the bid evaluation process shall be specified in the RFP, but may vary from one RFP to another (depending, for example, on the RFP scope and specific needs of the utility).
3. The bid evaluation process shall include consideration of differences between bidders with respect to proposed contract provisions, and

differences in anticipated compliance with such provisions, including but not limited to provisions intended to ensure:

- a. Generating unit and electric system reliability;
 - b. Appropriate risk allocations;
 - c. Counter-party creditworthiness; and
 - d. Bidder qualification.
4. Proposals shall be evaluated based on a consistent and reasonable set of economic and fuel price assumptions, to be specified in the RFP.
 5. Both price and non-price evaluation criteria (e.g., externalities and societal impacts, and preferred attributes consistent with the approved IRP), shall be described in the RFP, and shall be considered in evaluating proposals.
 6. In evaluating competing proposals, all relevant incremental costs to the electric utility and its ratepayers shall be considered (e.g., these may include transmission costs and system impacts, and the reasonably foreseeable balance sheet and related financial impacts of competing proposals).
 7. The amount of purchased power that a utility already has on its system, in terms of reliability and dispatchability, and the impacts that increasing the amount of purchased power may have, in terms of reliability and dispatchability, shall be taken into account in the bid evaluation. The RFP shall specify the methodology for considering this effect. Such methodology shall not cause double-counting with the financial effects discussed in sub-paragraph 6, above, and sub-paragraph 8, below.
 8. The impact of purchased power costs on the utility's balance sheets, and the potential for resulting utility credit downgrades (and higher borrowing costs), may be accounted for in the bid evaluation. Where the utility has to restructure its balance sheet and increase the percentage of more costly equity financing in order to offset the impacts of purchasing power on its balance sheet, this rebalancing cost shall also be taken into account in evaluating the total cost of a proposal for a new generating unit if IPP-owned, and it may be a requirement that bidders provide all information necessary to complete these evaluations. The RFP shall describe the methodology for considering financial effects.
 9. The type and form of non-price threshold criteria shall be identified in the RFP. Such threshold criteria may include, among other criteria, the following:

- a. Project development feasibility criteria (e.g., siting status, ability to finance, environmental permitting status, commercial operation date certainty, engineering design, fuel supply status, bidder experience, and reliability of the technology);
 - b. Project operational viability criteria (e.g., operation and maintenance plan, financial strength, environmental compliance, and environmental impact);
 - c. Operating profile criteria (e.g., dispatching and scheduling, coordination of maintenance, operating profile such as ramp rates, and quick start capability); and
 - d. Flexibility criteria (e.g., in-service date flexibility, expansion capability, contract term, contract buy-out options, fuel flexibility, and stability of the price proposal).
10. The weights for each non-price criterion shall be fully specified by the utility in advance of the submission of bids, as they may be based on an iterative process that takes into account the relative importance of each criterion given system needs and circumstances in the context of a particular RFP. The Commission, however, may approve of less than full specification prior to issuance of the RFP. Since the subjectivity inherent in non-price criteria creates risk of bias and diminution in bidders' trust of the process, the RFP must specify likely areas of non-price evaluation, and the evaluation process must be closely monitored and publicly reported on by the Independent Observer.

F. EVALUATION OF THE BIDS

1. The evaluation and selection process shall be identified in the RFP, and may vary based on the scope of the RFP. In some RFP processes, a multi-stage evaluation process may be appropriate.
2. The electric utility shall document the evaluation and selection process for each RFP process, for review by the Commission in approving the outcome of the process (i.e., in approving a PPA or a utility self-build proposal).
3. A detailed system evaluation process, which uses models and methodologies that are consistent with those used in the utility's IRP processes, may be used to evaluate bids. In anticipation of such evaluation processes, the RFP shall specify the data required of bidders.

G. CONTRACT NEGOTIATIONS

1. There may be opportunities to negotiate price and non-price terms to enhance the value of the contract for the bidder, the utility, and its ratepayers. Examples of such provisions that may be open for negotiation include fuel supply arrangements and project operating characteristics. Negotiations shall be monitored by the Independent Observer.
2. Contract interaction with affiliates shall be permitted, provided that such interaction is closely monitored by an Independent Observer.
3. The electric utility may use competitive negotiations among short-listed bidders.

H. FAIRNESS PROVISIONS AND TRANSPARENCY

1. The competitive bidding process shall judge all bidders on the merits only.
2. During the bidding process, the electric utility shall treat all bidders, including any utility affiliate, the same in terms of access to information, time of receipt of information, and response to questions.
3. A "closed bidding process" is generally anticipated, rather than an "open bidding process." Under one type of closed bidding process, bidders are informed through the RFP of: (a) the process that will be used to evaluate and select proposals; (b) the general bid evaluation and selection criteria; and (c) the proposed forms of PPAs and other contracts (e.g., turnkey contract). However, bidders shall not have access to the utility's bid evaluation models, the detailed criteria used to evaluate bids, or information contained in proposals submitted by other bidders. (But see sub-paragraph 4(c), below, regarding a losing bidder's access to the model.)
4. If the electric utility chooses to use a closed process:
 - a. The electric utility shall explain why the benefits of closure exceed the cost in terms of diminution in the bidders' trust in the process;
 - b. The Independent Observer must understand the model and observe the entire analysis; and
 - c. After the utility has selected a bidder, any losing bidder must receive sufficient and timely access to the model (but not the bidding information) to be able to replicate the analysis as it applied to its bid.

5. The host electric utility shall be allowed to consider its own self-bid proposals in response to generation needs identified in its RFP. An electric utility may consider a bid from its affiliate if the Commission determines, prior to commencement of the competitive bidding process, that the affiliate has no advantage due to its past or present relationship to the electric utility. Such an advantage includes, but is not limited to, having employees who, due to their former employment with the electric utility, have knowledge about the electric utility's needs not readily available to the employees of non-electric utility bidders. The restriction on electric utility purchases from an affiliate set forth in this paragraph does not apply when the affiliate is a qualifying facility exercising its mandatory sales rights under PURPA.
6. Procedures shall be developed by the utility prior to the initiation of the bidding process to define the roles of the members of its various project teams, to outline communications processes with bidders, and to address confidentiality of the information provided by bidders. Such procedures shall be submitted in advance to the Independent Observer and the Commission for comment.
7. If the IRP indicates that a competitive bidding process will be used to acquire a generation resource or a block of generation resources, then the utility will indicate, in the submittal of its draft RFP to the Commission for review, which of the RFP process guidelines will be followed, the reasons why other guidelines will not be followed in whole or in part, and other process steps proposed based on good solicitation practice; provided that the Commission may require that other process steps be followed.
8. If proposed, utility self-build facilities or other utility-owned facilities (e.g., turnkey facilities), or facilities owned by an affiliate of the host utility, are to be compared against IPP proposals obtained through an RFP process. The Independent Observer shall monitor the utility's conduct of its RFP process, advise the utility if there are any fairness issues, and report to the Commission at various steps of the process, to the extent prescribed by the Commission. Specific tasks to be performed by the Independent Observer shall be identified by the utility in its proposed RFP. The Independent Observer will review and track the utility's execution of the RFP process to ascertain that no undue preference is given to an affiliate, the affiliate's bid, or to self-build or other utility-owned facilities. The Independent Observer's review shall include, to the extent the Commission or the Independent Observer deems necessary, each of the following steps, in addition to any steps the Commission or Independent Observer may add: (a) reviewing the draft RFP and the utility's evaluation of bids, monitoring communications (and communications protocols) with bidders; (b) monitoring adherence to codes of conduct, and monitoring contract negotiations with bidders;

(c) assessing the utility's evaluation of affiliate bids, and self-build or other utility-owned facilities; and (d) assessing the utility's evaluation of an appropriate number of other bids. The utility shall provide the Independent Observer with all requested information. Such information may include, without limitation, the utility's evaluation of the unique risks and advantages associated with the utility self-build or other utility-owned facilities, including the regulatory treatment of construction cost variances (both underages and overages) and costs related to equipment performance, contract terms offered to or required of bidders that affect the allocation of risks, and other risks and advantages of utility self-build or other utility-owned projects to consumers. The Independent Observer may validate the criteria used to evaluate affiliate bids and self-build or other utility-owned facilities, and the evaluation of affiliate bids and self-build or other utility-owned facilities. In order to accomplish these tasks, all participants in the bidding process shall have the opportunity to submit to the utility proposed methods for making fair comparisons (considering both costs and risks) between the utility-owned or self-build facilities and third-party facilities. Such a comparison between self-build or other utility-owned facilities and IPP facilities may include modeling likely variation in construction costs, plant efficiency, plant outages, or operation and maintenance costs and assigning a risk premium to the self-build or other utility-owned facilities, and the likely impact of IPP proposals on the utility's capital structure, as well as the potential, in the case of a utility self-build bid, for cost overruns and fuel costs exceeding predictions. Such a comparison must make clear assumptions about the effect on the utility of the utility's own project.

9. Where the electric utility is responding to its own RFP, or is accepting bids submitted by its affiliates, the utility will take additional steps to avoid self-dealing in both fact and perception.

- a. The following tasks shall be completed as a matter of course (i.e., regardless of whether the utility or its affiliate is seeking to advance a resource proposal), including: (i) the utility shall develop all bid evaluation criteria, bid selection guidelines, and the quantitative evaluation models and other information necessary for evaluation of bids prior to issuance of the RFP; (ii) the utility shall establish a website for disseminating information to all bidders at the same time; and (iii) the utility shall develop and follow a Procedures Manual, which describes: (1) the protocols for communicating with bidders, the self-build team, and others; (2) the evaluation process in detail and the methodologies for undertaking the evaluation process; (3) the documentation forms, including logs for any communications with bidders; and (4) other information consistent with the requirements of the solicitation process.

- b. The following tasks shall be completed whenever the utility or its affiliate is seeking to advance a resource proposal, including:
 - (i) the utility shall submit its self-build option to the Commission one day in advance of receipt of other bids, and provide substantially the same information in its proposal as other bidders;
 - (ii) the utility shall follow the Code of Conduct; and (iii) the utility shall implement appropriate confidentiality agreements prior to the issuance of the RFP to guide the roles and responsibilities of utility personnel.
 - c. The Code of Conduct shall be signed by each utility employee involved either in advancing the self-build project or implementing the competitive bidding process, and shall require that:
 - (i) The electric utility shall establish internally a separate project team to undertake the evaluation;
 - (ii) No evaluation team member shall have any involvement with the electric utility self-build option or any career path that could be affected by such team member's evaluation;
 - (iii) During the RFP design and bid evaluation process, there shall be no oral or written contacts between the employees preparing the bid and the electric utility's employees responsible for bid evaluation, other than contacts authorized by the Code of Conduct and the RFP;
 - (iv) Throughout the bidding process, the electric utility shall treat all bidders, including its self-build bid and any electric utility affiliate, the same in terms of access to information, time of receipt of information, and response to questions.
 - d. A company officer, identified to the Independent Observer and the Commission, shall have the written authority and obligation to enforce the Code of Conduct. Such officer shall certify, by affidavit, Code of Conduct compliance by all employees after each competitive process ends.
 - e. Further steps may be considered, as appropriate, or ordered by the Commission.
10. Where the utility seeks to advance its proposed facilities (i.e., over those of other developers who may submit bids in its RFP), its proposal must satisfy all the criteria applicable to non-utility bidders, including but not

limited to providing all information required by the RFP, and being capable of implementation.

11. Bids submitted by affiliates shall be held to the same contractual and other standards as projects advanced by other bidders.

I. TRANSMISSION INTERCONNECTION AND UPGRADES

1. A winning bidder has the right to interconnect its generation to the electric utility's transmission system, and to have that transmission upgraded as necessary to accommodate the output of its generation.
2. With respect to procedures and methodologies for:
 - a. Designing interconnections;
 - b. Allocating the cost of interconnections;
 - c. Scheduling and carrying out the physical implementation of interconnections;
 - d. Identifying the need for transmission upgrades;
 - e. Allocating the cost of transmission upgrades; and
 - f. Scheduling and carrying out the physical implementation of transmission upgrades;

the electric utility shall treat all bidders, including its own bid and that of any affiliate, in a comparable manner.

3. Upon the request of a prospective bidder, the electric utility shall provide general information about the possible interconnection and transmission upgrade costs associated with project locations under consideration by the bidder.
4. In a compliance filing to be made within ninety days after issuance of this Framework, the electric utility shall submit a proposed tariff containing procedures for interconnection and transmission upgrades, to ensure comparable treatment among bidders including any electric utility or electric utility affiliate bid. This submission shall contain at least the following elements:

- a. A formal queuing process that ensures nondiscriminatory, auditable treatment of all requests for interconnection, upgrades and studies thereof;
 - b. A means, if practical, of minimizing the cost of studies by bundling different requests into a single study;
 - c. A methodology for allocating the costs of interconnection and transmission upgrades between the electric utility and the generator; and
 - d. A process for obtaining information on current capacity, operations, maintenance and expansion plans relating to the transmission and distribution systems.
5. To ensure comparable treatment, an Independent Observer expert in interconnection and transmission upgrades, selected and contracted for in the same manner as the Independent Observer described in Part III.C.6, above, shall review and monitor the electric utility's policies, methods and implementation and report to the Commission.

V. DISPUTE RESOLUTION PROCESS

The Commission will serve as an arbiter of last resort, after the utility, Independent Observer, and bidders have attempted to resolve any dispute or pending issue. The Commission will use an informal expedited process to resolve the dispute within thirty (30) days, as described in Part III.B.8. There shall be no right to hearing or appeal from this informal expedited dispute resolution process. The Commission encourages affected parties to seek to work cooperatively to resolve any dispute or pending issue, perhaps with the assistance of an Independent Observer, who may offer to mediate but who has no decision-making authority. The utility and Independent Observer shall conduct informational meetings with the Commission and Consumer Advocate to keep each apprised of issues that arise between or among the parties.

VI. PARTICIPATION BY THE HOST UTILITY

- A. Where the electric utility is addressing a need for firm capacity in order to address system reliability issues or concerns:
 - 1. In general, the utility shall develop a project proposal that is responsive to the resource need identified in the RFP. The proposal shall represent the utility's best ("self-build" or "utility-owned") response to that need in terms of foreseeable costs and other project characteristics.

2. If the utility opts not to advance its own project (i.e., over those of other developers), the utility shall request and obtain the Commission's approval. In making this request, the utility:
 - a. Shall demonstrate why relying on the market to provide the needed resource is prudent, and such demonstration shall include evidence of the number of viable sellers the utility expects will compete;
 - b. Shall develop a Contingency Plan to respond in a reasonable timeframe if the competitive bidding process unexpectedly fails to produce a viable project proposal; and
 - c. If necessary, shall identify a Parallel Plan that is capable of being implemented, to the extent feasible, after an appropriate amount of planning, which may or may not be the supply-side resource or resources in the approved IRP.
- B. Where the RFP process has as its focus something other than a reliability-based need, the utility may choose (or decline) to advance its own project proposal either in the form of a self-build or utility-owned project.
- C. If the RFP process results in the selection of non-utility (or third-party) projects to meet a system reliability need or statutory requirement, the utility shall develop and periodically update its Contingency Plan and, if necessary, its Parallel Plan to address the risk that the third-party projects may be delayed or not completed. When submitting the RFP to the Commission, the electric utility shall separately submit, to the extent practical, a description of such activities and a schedule for carrying them out. Such description shall be updated as appropriate.
 1. The plans may include the identification of milestones for such projects, and possible steps to be taken if the milestones are not met.
 2. Pursuant to the plans, it may be appropriate for the utility to proceed to develop a self-build or utility-owned project or projects until such action can no longer be justified as reasonable. The self-build or utility-owned project(s) may differ from the project(s) advanced by the utility in the RFP process, or the resource(s) identified in its approved IRP Plan.
 3. The contracts developed for the RFP process to acquire third-party resources shall include commercially reasonable provisions that address delays or non-completion of third-party projects, such as provisions that identify milestones for the projects, seller (i.e., bidder) obligations, and utility remedies if the milestones are not met, and may include provisions to provide the utility with the option to purchase the project under certain circumstances or events of default by the seller (i.e., the bidder).

- D. A utility shall not advance mutually exclusive projects in response to an identified need.

VII. RATEMAKING

- A. The costs that an electric utility reasonably and prudently incurs in designing and administering its competitive bidding processes are recoverable through rates to the extent reasonable and prudent.
- B. The costs that an electric utility incurs in taking reasonable and prudent steps to implement Parallel Plans and Contingency Plans are recoverable through the utility's rates, to the extent reasonable and prudent, as part of the cost of providing reliable service to customers
- C. The reasonable and prudent capital costs that are part of an electric utility's Parallel Plans and Contingency Plans shall be accounted for similar to costs for planning other capital projects (provided that such accounting treatment shall not be determinative of ratemaking treatment):
 - 1. Such costs would be accumulated as construction work in progress, and carrying costs would accrue on such costs. If the Parallel Plans or Contingency Plans, as implemented, result in the addition of planned resources to the utility system, then the costs incurred and accrued carrying charges would be capitalized as part of the installed resources (i.e., recorded to plant-in-service) and added to rate base. The costs would be depreciated over the life of the resource addition.
 - 2. If implementation of the Parallel Plans or Contingency Plans is terminated before the resources identified in such plans are placed into service, the costs incurred and accrued carrying charges included in construction work in progress would be transferred to a miscellaneous deferred debit account and the balance would be amortized to expense over five years (or a reasonable period determined by the Commission), beginning when the base plan resource is placed into service. The amortization expense would be included in the utility's revenue requirement when there is a general rate case. Under appropriate circumstances, the Commission may allow additional carrying costs to accrue on the unamortized miscellaneous deferred balance.
- D. The regulatory treatment of utility-owned or self-build facilities will be cost-based, consistent with traditional cost-of-service ratemaking, wherein prudently incurred capital costs are included in rate base; provided that the evaluation of the utility's bid must account for the possibility that the capital or running costs actually incurred, and recovered from ratepayers, over the plant's lifetime, will vary from the levels assumed in the utility's bid. Any utility-owned

project selected pursuant to the RFP process will remain subject to prudence review in a subsequent rate proceeding with respect to the utility's obligation to prudently implement, construct or manage the project consistent with the objective of providing reliable service at the lowest reasonable cost.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 22588 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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